THE REPORT

OF

THE REGISTER OF COPYRIGHTS

ON

WORKS OF ARCHITECTURE

U.S. Copyright Office
Library of Congress
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June 19, 1989

Chairman Robert W. Kastenmeier
Subcommittee on Courts, Intellectual
  Property and the Administration of Justice
House of Representatives
Washington, D.C. 20515

Dear Chairman Kastenmeier:

I am pleased to submit to you my report on copyright and works of architecture. As you requested in your letter of April 27, 1988, I have conducted a general inquiry into the current nature and scope of protection for works of architecture, whether existing protection is adequate to serve as an incentive for the creation of new works of architecture, and the effect increased protection would have on the housing industry and consumers.

In response to a Notice of Inquiry published in the Federal Register, inviting the public to comment on a broad range of issues raised by protection for works of architecture, we received written submissions from ten individuals and organizations, which we have published in the Appendix to the report.

In the report, I review history of architecture as an art form, the practices on ownership of rights in the architectural profession, caselaw in the United States on protection for works of architecture and works relative to architecture, the legislative history in the United States on protection for works of architecture, protection for works of architecture under the Berne Convention and under the laws of Berne members countries, and, finally, analyze the arguments favoring and opposing protection for works of architecture under our copyright laws, as well for increased copyright protection for architectural plans and specification.

I would be pleased to respond to any requests for further information.

Sincerely,

Ralph Oman
Register of Copyrights

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ACKNOWLEDGMENTS

I am grateful to many individuals and organizations in the architectural profession and other affected industries for their responsiveness and cooperation in supplying information for this report. I refer particularly to the American Institute of Architects and the Frank Lloyd Wright Foundation.

As with other Copyright Office reports, the Report of the Register of Copyrights on Works of Architecture results from the contributions of many staff who perform such diverse functions as research, writing, typing, reviewing, designing and printing. Although it is not possible to name all of these contributors, I acknowledge the fact and significance of their efforts. I would, however, like to make special mention of the efforts of William F. Patry, Esq., Policy Planning Advisor to the Register of Copyrights, who shouldered the laboring oar in preparing the initial draft, as well as Ruth Goddard for her assistance in typing the final version of the report, Alicia Byers, Guy Echols, and Sandy Jones for their diligent proofreading efforts, and Sandra Brown, Carol Duling, and Cynthia White for their invaluable secretarial assistance in typing earlier versions of the report.

Ralph Oman
Register of Copyrights

PREFACE

At the outset, I welcomed this study as a non-controversial and edifying assignment, focused on a single, specific form of creativity and occurring in an atmosphere generally free of intense commercial conflicts--conflicts that have made the study of many other copyright questions volatile and confrontational. In the final reckoning, however, I know of no other issue to arise in the Copyright Office that has engendered such deep and bitterly fought professional disagreements. Instead of our usual dainty and refined cerebral discourse, we had robust, knock-down-drag-out fights, and in the last act I wound up with more bodies on the floor around me than Macbeth.

These highly technical disagreements have left their mark on the study, which explores in detail the legislative history of the 1976 Copyright Act, foreign and domestic law regarding architectural works, and the application of the Berne Convention to these works. In these introductory remarks, I want to cut through the varied materials developed in the study and highlight the central issues as directly as possible. I also want to lay out policy choices Congress will confront as it weighs how best to protect architectural works.

We cannot examine copyright protection of architectural works in a vacuum. We must face head-on the central issue: did Congress intend architectural works to be treated in all cases as useful articles, or did Congress leave room in the law for the protection of some architectural works as works of art perhaps as a subset of sculptural works.

To answer these questions, we must read the tea leaves of the legislative history and try to determine where Congress drew lines that allow full copyright protection of works of art (pictorial, graphic and sculptural works) but limit the availability of such protection to useful articles. Both works of art and articles of industry contain aesthetic features, often reflecting extremely high levels of personal creativity.

But Congress chose not to protect under copyright the aesthetic appearance of useful articles. That would be reserved to design protection -- a shorter and more limited monopoly interest than copyright.

With the decision to drop Title II of the 1976 Copyright Revision Bill, which would have created a comprehensive system of design protection, Congress faced the daunting task of creating rules that would allow the Copyright Office and the courts to identify the protectible artistic elements of useful articles, without opening the floodgates for massive use of copyright protection for the industrial arts. To a large degree, the rules Congress fashioned built upon prior case law and the past practices of the Copyright Office.

These rules, however, are exceptionally difficult to apply and invariably generate controversy. They involve making determinations as to whether a work seeking copyright protection is, "intrinsically" a "useful article", and, if so, whether it has pictorial, graphic, or sculptural features that are capable of being "identified separately from, and are capable of existing independently of, the utilitarian aspects of the article." And in determining whether separability can be made, the legislative history states that such "separability" can be either physical or "conceptual."

Congress regarded architectural works as "a special situation," but made it clear that the rules referred to above applied to architectural works. In short, Congress gave little if any specific guidance on how architectural works were "special" and what that meant in respect to application of the tests of utility and separability.

In the course of this study, it became apparent to me that the copyrightability of architectural works -- particularly in the context of the copyright registration process -- turned on the application of the same set of rules that we apply to any attractively formed articles of industry. In order to avoid protection of the mere shape of clearly uncopyrightable articles (such as electric shavers, bicycle racks, and street lights), the Copyright Office has required a relatively high, or relatively clear, degree of separability between the utilitarian function of an article and its pictorial, graphic, or sculptural elements.

Over time, these practices have hardened to deny registrability to the overall shape of any article with a useful function, regardless of whether or not utility is the predominant characteristic of the work. These practices effectively require that the separable feature be, in its own right, a fully realized work of pictorial, graphic, or sculptural authorship. An inevitable conflict arises between denial that the "shape" of any useful article can be a work of art and the protectibility of non-representational sculptural expression.

Our study indicates that evolving notions of conceptual separability, or of what constitutes an intrinsically useful article, could at some point accord protection to the overall shape of at least some architectural works as sculptural works. The requirements of the Berne Convention regarding works of architecture do not obligate us to protect buildings per se. So, evolution of the law along lines suggested in part of this study could prove the judgment of Congress (in leaving the matter to the courts applying the present law) correct respecting compatibility with Berne.

But such development is not only speculative, it may be improbable, for it gives too little weight to the real burden of history under which the protection of architectural works in the United States labors. Rightly or wrongly, whether laudably faithful to the law, or displaying a regrettable lack of imagination and insight, U.S. courts have largely declined to protect architectural works as works of art. Admittedly, they have done so principally before the enactment of the 1976 Copyright Act. And they have ruled with reference to conventional housing and modest commercial buildings -- structures that might have a very hard time acquiring copyright protection in many Berne states with well-developed regimes protecting architectural works as works of art. The real tests of U.S. law are yet to come, in regard to copyright for monumental architectural works, works which society at large regards as artistic statements, works with such a self-evident, unmistakable stamp of artistic individuality that the useful features of the structure are fundamentally tertiary to the real nature of the work.

The role of the Copyright Office regarding determinations of the copyrightability of architectural works is of special concern to me. Obviously, the registration practices of the Office reflect our understanding of the law, our reading of Congressional intent, and our interpretation of the rulings of the courts. Our practices and policies in this field are not regulatory, but our best judgment of the ever-changing nature of copyright.

We are frankly reluctant to tamper with practices that are intended to effectuate basic policy decisions of the Congress, endorsed by the courts, practices that greatly circumscribe the amount of copyright protection available to articles of utility in general. The Copyright Office is willing, however, to re-examine its existing practices and consider limited changes which would permit registration of at least a very small number of architectural works based upon the overwhelmingly sculptural and artistic nature of their overall shape.

In such an effort, it may also be possible to draw distinctions between architectural works and useful articles generally or to establish architectural works as a special category of useful article. Such a step, if possible and acceptable to the Congress, could broaden our experience with claims to copyright in architecture and sharpen issues of copyrightability should they reach the stage of litigation. The propriety or adequacy of our actions would in the first instance be left to the courts.

If Congress believes such a step could be a reasonable exercise of the Register's limited authority, I propose to draft a special, interpretive regulation governing claims to copyright in architectural works and subject it to a full public hearing and opportunity for thorough comment and analysis. There is precedent for such proceedings, in connection with proposed changes in Copyright Office rules. In recent memory we have held hearings on typeface design, graphic design of printed publications, and computer screen displays.

Having made that suggestion as a possibility, I should state a modest preference for carefully crafted legislation to deal with the availability of copyright protection for works of architecture. I say this because while it may be possible for us to respond in at least some small part to the problem of copyrightability of architectural works, most new developments in the scope of protectible subject matter ultimately call for a legislative response. Thus, while the copyright law protected computer programs since 1964 and saw this fact confirmed in 1976, clarifying amendments -- critical definitions and public interest exceptions -- were needed and provided in 1980.

Similarly, any greater protection of architectural works in the courts -- under any theory -- must raise questions of fair use, rights of owners of buildings embodying architectural works, limits on reproduction rights, remedies and definitions of protectible matter. So a comprehensive legislative solution might be preferable.

In conclusion, let me reiterate that this report has not been an easy task for the Copyright Office; it has had its moments of excitement, and even high drama. But the final product at least gets all of the complex issues on the table for Congress to scrutinize.

The study also implies that a related subject long deferred by the Congress may be ripe for fresh consideration. That is the matter of design protection. As we note in the study, adherence to the Berne Convention appears to preclude the protection of some architectural works solely by design. There may be, nonetheless, room for design protection of architectural works that fall short of requirements for copyrightability (whether new statutory provisions or as derived from case law).

The disagreements within the Office over enhanced copyright protection for architectural works have less to do with attitudes toward the Chrysler Building than toward designs of Chrysler cars. It is, in fact, the implications of copyright protection for architecture in respect of a wide range of attractively shaped useful articles that gives us the most pause. Pressures upon the copyright system to absorb expressions of creative industrial design are being felt and may well exist in the architectural field. Congress can seize this opportunity and not only provide stability to the copyright system, but greater order and fairness to the field of industrial design as well.

Ralph Oman
Register of Copyrights
17 June 1989

EXECUTIVE SUMMARY

During the recent, successful effort to adhere to the Berne Convention for the Protection of Literary and Artistic Works, Congress reviewed the obligations of the United States to protect the subject matter enumerated in Article 2(1) of the (1971) Paris text of Berne. Article 2(1) begins by stating that the expression "literary and artistic works" shall include "every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression." A series of specific examples of such works is then given. Among the works so specified are "works of architecture," "plans and sketches relative to architecture," and, "three-dimensional works relative to architecture."

In deciding on the form of implementing legislation for Berne adherence, Congress adopted the "minimalist approach:" i.e., to make only those changes absolutely required to join the Convention. In analyzing the United States' obligations to protect the subject matter specified in Article 2(1), and in particular the three types of subject matter relating to architecture, Congress heard testimony that current U.S. copyright law unquestionably protects "plans and sketches relative to architecture" as well as architectural models -- "three-dimensional works relative to architecture." Congress also heard testimony that current U.S. copyright law did not adequately protect "works of architecture." Based on this testimony,

all of the original Berne implementing legislation contained provisions providing for the express protection for works of architecture.

Late in the Berne adherence deliberations, the House Subcommittee on Courts, Civil Liberties and the Administration of Justice [1] received testimony from two highly respected copyright experts, former Register of Copyrights Barbara Ringer and Professor Paul Goldstein, that U.S. adherence to the Berne Convention might not require the explicit treatment of works of architecture contemplated in the pending bill, H.R. 1623.[2] Based on the uncertainty regarding the need for the architectural works language in the bill, and reluctant to legislate in an area where very little information was then available, Congress chose to delete the express references to works of architecture in the implementing legislation and requested the Copyright Office to conduct the present study. Congress made explicit that architectural plans are protected by the copyright law.

This report represents the culmination of our review of the comments submitted in response to our Notice of Inquiry, testimony taken before the congressional committees, the legislative history of protection for architectural works in the United States and the Berne Convention, case law in the United States, and foreign statutes and case law.

The report is comprised of seven chapters and an appendix containing the statements submitted in response to our Notice of Inquiry, the Notice of Inquiry itself, and various two dimensional reproductions of works of architecture.

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[1] The Subcommittee subsequently changed its name to the Subcommittee on Courts, Intellectual Property and the Administration of Justice.

[2] House Berne Hearings at 680 (testimony of Paul Goldstein). _See also id_. at 689 (testimony of Barbara Ringer).

Chapter 1: Introduction

After noting the genesis of this report, the chapter frames the issues examined in the report. These issues are: (1) whether the Copyright Act currently grants copyright owners of works related to architecture the right to prohibit the unauthorized construction of the work of architecture depicted therein; (2) if such rights are not granted, whether they should be; (3) whether the Copyright Act currently grants protection to works of architecture; (4) the extent of protection for works of architecture in Berne member countries; and (5) the nature and scope of noncopyright forms of protection.

Chapter 2: Practices in the Architectural Profession Regarding Ownership of Rights

This chapter discusses the development and use of standard contracts (called "instruments of service") in the architectural profession to make certain that architects retain rights in their drawings and specifications. Reasons why architects desire to retain rights in their work product are reviewed. These include: (1) limiting exposure to tort liability by ensuring that plans developed for use in one environment are not used in a different (and inappropriate) environment; (2) enabling architects to obtain payment for reuse of their plans; and (3) permitting architects to prohibit alterations in the design that would detract from the desired aesthetic effect.

We note that unlike law and accounting firms, architectural firms tend to be small. Most firms (62 percent) have fewer than 5 employees; 84 percent have fewer than ten employees. Designing office buildings is the largest single source of income for architectural firms, accounting for 16 percent of billings. This is followed by educational facilities (12 percent), health care facilities (10 percent), and multi-family housing, single-family housing, and commercial interiors, each of which account for 9 percent.

Multi-family housing is the greatest source of income for firms with 10-19 employees, while single-family housing provides one-person firms with 30 percent of their business. In general, single-family housing is most important for smaller firms and much less important for the largest ones. Firms with 20 or more employees receive less than 3 percent of their revenues from single-family housing.

Chapter 3: Case law in the United States Regarding Architectural Works

Case law on copyright in works of architecture and works related to architecture is divided in the pre-1978 era between common law (state) and federal decisions. Accordingly, this chapter's organization reflects this division: first, common law decisions are summarized by state; second, federal decisions are summarized by circuit. Finally, other decisions involving forms of protection, such as design patent, trademark, and unfair competition are reviewed.

Given the wide variety of approaches taken by the courts to the issues of copyrightability and scope of protection, it is difficult to extract black letter law from the cases. A few issues seem settled, however. First, filing of architectural plans with the local permit authority does not, in and of itself, constitute publication of the plans. Similarly, delivery of copies of the plans to contractors or customers does not constitute publication of the plans. A work of architecture is not considered a copy of the plans, nor does construction of a work of architecture publish the plans.

While the courts are generally unwilling to find that copyright in plans extends to prohibit unauthorized construction of the structure depicted therein, some have enjoined construction of the structure in reliance upon infringing plans; others have awarded damages based on profits derived from sales of such houses.

Chapter 4: Legislative History of Protection Under U.S. Law of Works of Architecture and Works Related to Architecture

This chapter traces legislative activity in the United States concerning architectural works, including bills related to efforts to adhere to the Berne Convention in the 1920s and 1930s. Special attention is given to the recent successful effort to adhere to the Berne Convention and the decision to delete from the Berne Implementation Act of 1988 express provisions for works of architecture.

Chapter 5: Protection of Works of Architecture Under the Berne Convention

This chapter parallels Chapter 4 by tracing the history of protection of works of architecture in the Berne Convention, beginning with the 1896 Additional Act and Interpretative Declaration, then the 1908 Berlin Revision which amended Article 2 of the Convention to require protection for works of architecture, and concluding with recent World Intellectual Property Organization efforts to establish a model copyright law.

Chapter 6: Foreign Laws on Works of Architecture

This chapter surveys the statutes (and occasionally the case law) of the other 81 Berne member countries with respect to works of architecture. A number of common provisions run through these statutes. First, the laws expressly protect architectural works embodied in buildings and structures. Second, works of architecture are generally protected without the need to meet a higher standard of originality, e.g., artistic merit. Some laws expressly state that no such standard is required, while others provide special privileges to authors of works of architecture that possess such a character.

Works of architecture are generally granted moral rights, a right that conflicts, on occasion, with a right generally given to owners of buildings to make alterations of a technical nature or for purposes of practical utilization. Works of architecture are generally excluded from a droit de suite granted other works of authorship, and, if located in a publicly accessible location, are subject to unauthorized two-dimensional reproduction in the forms of photographs, drawings, and paintings.

Publication of a work of architecture is usually not defined, but is typically stated not to include reproduction by photographs or construction. Works of architecture are subject to the general infringement provisions for damages, except significantly, that an injunction may not usually be granted against a substantially similar building once construction thereof has begun, and infringing buildings may not be demolished.

Chapter 7: Analysis and Conclusion

This chapter is divided into three parts: (1) analysis of the comments submitted in response to our Notice of Inquiry and of existing U.S. case law on works of architecture; (2) presentation of several views on the protectibility of works of architecture under different theories of conceptual separability; and, (3) our conclusions.

The Office reviewed ten comments in response to our Notice of Inquiry. Commentators included architects, engineers, the American Institute of Architects, the Frank Lloyd Wright Foundation, an information industry trade association, a computer company, a law professor, and law firms representing architects, contractors, and owners of buildings.

Of the nine comments regarding whether the copyright law does (or if not should) protect conceptually separable pictorial, graphic, or sculptural elements embodied in architectural structures, seven answered affirmatively. One negative response, from a solo architect, stated that it would be difficult to determine substantial similarity between two works of architecture, and, in any event, architects "often refer to aspects of other buildings to verify their ideas. The use of precedent is necessary and commonplace." The other negative comment was from the American Institute of Architects, which noted, however, that a number of its members were in favor of copyright protection for works of architecture. The AIA's opposition was apparently based on grounds similar to those expressed by the solo architect.

Our analysis of the nature and scope of existing case law notes a fairly well established rule that copyright in architectural plans does not extend to prohibit unauthorized construction of the structure depicted therein. There is also dicta in a number of decisions to the effect that "buildings" are not subject to copyright protection. We were, however, unable to find a single decision in which a claim was adjudicated for a work of architecture such as the Guggenheim Museum, as compared with alleged infringement of plans for a tract residential house.

The Copyright Act does not include works of architecture as a separate class of protected subject matter in Section 102(a). However, some works of architecture (or parts thereof) could be considered sculptural works under Section 102(a)(5). The definition of "pictorial, graphic, and sculptural works" in the 1976 Copyright Act states that it includes "three-dimensional works of fine, graphic, and applied art," and that such works shall

> include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.

Nonmonumental works of architecture are, concededly, "useful articles," [3] and thus the question is whether the structure itself contains any sculptural features that are "capable of existing independently of" the utilitarian aspects of the architectural structure. The House Report accompanying the 1976 Copyright Act discussed the issue of copyright in works of architecture:

> A special situation is presented by architectural works. An architect's plans and drawings would, of course, be protected by copyright, but the extent to which that protection would extend to the structure depicted would depend upon the circumstances. Purely nonfunctional or monumental structures would be subject to full copyright protection under the bill, and the same would be true of artistic sculpture or decorative ornamentation or embellishment added to a structure. On the other hand, where the only elements of shape in an architectural design are conceptually inseparable from the utilitarian aspects of the structure, copyright protection for the design would not be available. [4]

We interpret this passage as follows:

1. Architectural plans and drawings are protected without the need for a separability analysis;
2. Protection for architectural structures is available under the following circumstances:
    a. Purely nonfunctional or monumental structures are protected without the

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[3] See 17 U.S.C. Sec. 101 (1978) (definition of "useful article"): "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information."

[4] H.R. REP. NO. 1476, 94th Cong., 2d Sess. 55 (1976).

need for a separability analysis;

b. Artistic sculpture or decorative embellishment added to a structure is (generally) protected under a separability test.

In the past, courts have determined copyrightability of pictorial, graphic, and sculptural works embodied in useful articles according to the language of the Act, prior decisions, and Copyright Office regulations. This practice has continued under the 1976 Act, but not without some disagreement among distinguished jurists regarding what the appropriate standard is. Nowhere is this disagreement better illustrated than in the Second Circuit, where three recent decisions approach the issue from different perspectives, and each has thoughtful dissents.

The Copyright Office's interpretation of conceptual separability is set forth in Compendium II of Copyright Office Practices:

> Conceptual separability means that the pictorial, graphic, or sculptural features, while physically inseparable by ordinary means from the utilitarian item, are nevertheless clearly recognizable as a pictorial, graphic, or sculptural work which can be visualized on paper, for example, or as free-standing sculpture, as another example, independent of the shape of the useful article, i.e., the artistic features can be imagined separately and independently from the useful article without destroying the basic shape of the useful article. The artistic features and the useful article could both exist side by side and be perceived as fully realized, separate works — one an artistic work, and the other a useful article.[5]

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[5] Paragraph 505.03. Compendium II Copyright Office Practices, 1984.

In line with this interpretation of the 1976 House Judiciary Committee report, the Copyright Office will register claims to artistic features embodied in functional structures if and to the extent that they meet the separability test.

There are, however, other interpretations of the law, which we set forth in summary form to give Congress a foretaste of the kinds of arguments the courts will hear with ever greater frequency as litigants labor creatively to develop existing law and practice to meet the clear words of the Berne Convention. Unless Congress intervenes decisively and gives the courts clear guidance, we may find the courts wandering down garden paths Congress might view with some alarm.

Judge Jon O. Newman, the eminent jurist on the Second Circuit, embraces the "temporal displacement" test. Under Judge Newman's test, "[f]or the design features to be 'conceptually separate' from the utilitarian aspects of the useful article that embodies the design, the article must stimulate in the mind of the beholder a concept that is separate from the concept evoked by its utilitarian function." The requisite "separateness" is said to exist "whenever the design creates in the mind of the ordinary observer two different concepts that are not inevitably entertained simultaneously." The test is not whether the ordinary observer fails to recognize the object as a utilitarian article, but "only whether the concept of the utilitarian function can be displaced in the mind by some other concept."

The Frank Lloyd Wright Foundation suggested that the test of conceptual separability should turn on whether or not "the ordinary observer understands the work as having a conceptually dual function -- that of a work of art and that of a useful article." Under this approach, sculptural elements embodied in works of architecture would be registrable if the conceptually separable sculptural elements otherwise meet the originality requirements. Under the Wright test such elements do not have to exist "side by side and be perceived as fully realized, separate works -- one an artistic work, the other a useful article." And unlike Judge Newman's temporal displacement test, the Wright test does not require the observer to (temporarily) displace the utilitarian function. One need only appreciate the existence of the separable elements, a far less abstract task.

Yet another approach to conceptual separability asks the following two questions: (1) Can an ordinary observer conceive the presence of artistic features in a structure such as the Guggenheim Museum? (2) If so, are those features dictated by the Guggenheim's function as a museum? If not, then the artistic features are conceptually separable and thus protectible under this theory. This approach would find that the Guggenheim readily meets this standard.

In our conclusions, we note both the language from the 1976 House Judiciary Report on works of architecture and the 100th Congress' decision not to include express protection for works of architecture in the Berne implementing legislation based on a belief that existing federal and state law was compatible with our Berne obligations.

The subject matter article of the Berne Convention, Article 2(1), makes specific reference to three categories of literary and artistic works that relate to architectural structures: works of architecture; illustrations and plans relative to architecture; and three-dimensional works relative to architecture. The second and third categories appear to be adequately protected by United States copyright law -- that is, architect's blueprints, architectural models, and separable artistic features apart from the overall shape are protected by our copyright law. Whether the combination of federal and state protection adequately protects works of architecture remains in doubt.

In our survey of Berne member states, we attempted to probe into the precise meaning of the requirement to protect works of architecture. Clear answers have proved elusive -- in part because language and cultural differences make comparison and analysis difficult. We see, for example, that the most recent international attempt to state uniform principles of protection for works of architecture for a model law reached somewhat inconclusive results. The countries did agree that the obligation extends to "original creative elements" in respect of works of architecture, but there was no consensus on adding the criterion "artistic" as a limitation on the types of buildings subject to protection. The countries agreed that the right of reproduction includes the right to construct the work of architecture and the making of copies in any manner or form of the works relative to architecture.

The copyright law of virtually every Berne member country makes express reference to protection for buildings and structures. Works of architecture are generally protected without the need, apparently, to meet a higher standard of originality such as artistic merit. Some countries, however, do apply a standard of artistic merit or at least extend special privileges to authors of such works.

Our review of existing law in the United States, the evolution of protection for works of architecture in the Berne Convention, and the laws and practices in Berne member countries, suggests to us that the Berne Convention requires copyright protection for works of architecture beyond that now accorded under United States law, including the overall shape of what may be termed works of "fine architecture," e.g., the Guggenheim Museum. We would support appropriately drafted legislation to make U.S. law more clearly consistent with the Berne Convention. However, in order to better provide Congress with policy options, we set forth four possible solutions.

(1) Create a new subject matter category for works of architecture in the Copyright Act and legislate appropriate limitations.

Congress could create a new subject matter category covering works of architecture and legislate appropriate limitations. A proposal along the lines of H.R. 1623 in the 100th Congress is one possibility. Among the issues needing particular legislative consideration are the following:

- the exact nature of the buildings covered by the new subject matter category (if Congress wishes, protection could be confined to "fine artistic structures," or to structures that exist in a unique form, with a specific exclusion for residential tract housing);

- the nature of the limitations on the exclusive rights (limitations such as the right of the building owner to make technical alterations, and the owner's right to make external images, both of which are common);
- the nature of specific moral rights protection, if Congress deems additional protection warranted; and
- the nature of the remedies (for example, limiting injunctive relief and preventing destruction of buildings).

(2) **Amend the Copyright Act to give the copyright owner of architectural plans the right to prohibit unauthorized construction of substantially similar buildings based on those plans.**

Congress could give serious consideration to the proposal of the American Institute of Architects for a limited amendment of the Copyright Act, in the nature of a right to prohibit unauthorized construction of substantially similar buildings based upon copyrighted architectural blueprints. One factor that Congress may wish to consider in this regard is that, as shown in Chapter 2, the smaller architectural firms would most likely find their works copied, and they would, therefore, benefit the most from increased protection.

If this alternative is pursued, however, Congress should also consider legislating with reference to the issues identified under the first alternative: what structures should it protect, and what limitations should it impose on rights and remedies.

(3) Amend the definition of "useful article" in the Copyright Act to exclude unique architectural structures.

As a simpler alternative, Congress could amend the definition of "useful article" in the Copyright Act to exclude unique (i.e., generally single copy) architectural structures. By this amendment, the separability test of the definition of pictorial, graphic, and sculptural works would no longer apply to unique architectural structures. Their overall shape could be protected by copyright if the design is original within the meaning of the copyright law. By limiting the amendment to unique architectural structures, Congress would minimize the impact of the change in the law affecting works of architecture, and thereby avoid possible dislocations in the construction industry. At the same time, this approach would protect the most deserving architectural structures.

This approach would not be favored by those who might seek protection for a broad class of architectural structures. The amendment should probably be very specific and narrow in respect of the structures affected.

(4) Do nothing and allow the courts to develop new legal theories of protection under existing statutory and case law, as they attempt to come to grips with U.S. adherence to the Berne Convention.

As we have seen, novel theories for extending protection to works of architecture abound. Congress could permit the courts to review these theories and their applicability to works of architecture in light of Berne adherence. This approach would permit the courts to develop the law with the benefit of a specific set of facts, but has the disadvantage of leaving open the possibility of conflicting theories as well as the possibility of weak or inadequate protection for subject matter we have concluded the United States is obligated to protect under the Berne Convention.

In conclusion, the Copyright Office expresses no preference for a particular solution, legislative or otherwise. We recommend that Congress hold additional hearings and give further serious consideration to enacting additional protection for works of architecture. The Office will be pleased to offer whatever technical assistance may be requested.

CHAPTER 1: INTRODUCTION

The Copyright Office has prepared this report at the request of the Honorable Robert W. Kastenmeier, Chairman of the House Subcommittee on Courts, Intellectual Property and the Administration of Justice, and Senator Patrick J. Leahy, Chairman of the Senate Subcommittee on Science and Technology and a member of the Subcommittee on Patents, Copyrights and Trademarks.

On April 27, 1988, Chairman Kastenmeier wrote to the Register of Copyrights, Ralph Oman, requesting a general inquiry into the nature and scope of protection for works of architecture, including under the copyright law, trade dress, unfair competition, and contractual arrangements.[1] The Office was directed to consult with architects, builders of commercial and residential structures, appropriate governmental agencies, academics, and interested members of the public.

In response to this request, on June 8, 1988, the Office published a Notice of Inquiry in the Federal Register, inviting comment from the public in three areas: (1) the type of copyright and other forms of protection (i.e., contractual, trade dress, unfair competition, etc.) currently available for works of architecture and works related to architecture; (2) the need, if any, for protection beyond that now available, including whether perceived deficiencies are capable of resolution through private consensual arrangements; and (3) the laws and actual practices of foreign countries in protecting works of architecture.[2]

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[1] This letter is reproduced in the Appendix.

Ten individuals and organizations submitted written comments in response to the Notice of Inquiry: (1) Frank X. Arvan (an individual architect); (2) Robert J. Dregre Associates, Inc. (architects); (3) Professor David Shipley; (4) Mark K. Gilligan (a structural engineer); (5) Hartigan & Yanda and Litman, and McMahon & Brown (architects and attorneys); (6) the American Institute of Architects;[3] (7) International Business Machines; (8) Information Industry Association; (9) Thompson, Hine & Flory (a law firm); and (10) The Frank Lloyd Wright Foundation.

Purpose of the Study

The genesis of this study is found in the recent successful effort of the United States to adhere to the Berne Convention for the Protection of Literary and Artistic Works.[4] Under Article 2(1) of the Convention, member countries are obligated to protect, among other things, works of architecture, plans and sketches, and "three dimensional works relative to architecture." In this report, we refer to "works related to architecture" as including plans, blueprints, diagrams, models, elevations, and the like. "Works of architecture" refers to the actual structures -- e.g., monuments and buildings.

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[2] 53 Fed. Reg. 21536-21538 (June 8, 1988). The notice is reproduced in the Appendix.

[3] This organization also submitted a reply comment.

[4] Adherence was effective on March 1, 1989. P.L. 100-568, 102 Stat. 2853 (1988).

The copyright law, both common law and federal, has long protected works related to architecture.[5] Similarly, it is well settled that the presence of an aesthetically pleasing overall appearance on a three-dimensional useful article[6] does not, of itself, render the object copyrightable.

During hearings on the Berne implementing legislation, little interest in the scope of protection for works of architecture and works related to architecture was expressed by members of the public. Most witnesses stated a belief that amendments to the Copyright Act protecting works of architecture were necessary in order to bring the United States into compliance with our Berne Convention obligations. Two witnesses (a law professor and a former Register of Copyrights) stated that existing law was sufficient to meet those obligations. This view was premised on language in the 1976 House Judiciary Committee Report indicating that functional works of architecture containing conceptually separable pictorial, graphic, and sculptural elements are subject to protection under the 1976 Act.

The Ad Hoc Working Group on U.S. Adherence to the Berne Convention noted that "while adornments or embellishments to a building may be eligible for U.S. copyright protection, the buildings themselves -- useful articles as to which the art is inseparable from the utilitarian aspect -- are unprotectible under copyright." This group concluded that U.S. law was incompatible with Berne to the extent that it did not protect the overall shape of functional structures.[7] The Copyright Office also questioned whether existing law was compatible.

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[5] Notwithstanding this, the Berne implementing legislation amended the definition of "pictorial, graphic and sculptural works" in Section 101 of the Act to expressly include architectural plans as copyrightable subject matter. P.L. 100-568, 102 Stat. 2853, 100th Cong., 2d Sess. (1988). See also H.R. Rep. No. 100-609, 100th Cong., 2d Sess. 49-51 (1988) (Star Print); S. Rep. No. 100-352, 100th Cong., 2d Sess. 8-9 (1988).

[6] A "useful article" is defined in Section 101 of the 1976 Copyright Act as "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a 'useful article.'"

While the American Institute of Architects requested a change in the law to make it a violation of the Copyright Act to use infringing architectural plans to construct the building or structure depicted in the plans, the AIA also testified that existing law need not be changed in order to adhere to the Berne Convention, a conclusion, however, that may have been the result of a misunderstanding of the Convention's requirements.

Congress ultimately decided that under the "minimalist approach," existing law did not have to be amended to adhere to the Berne Convention, but asked the Copyright Office to conduct this study in order to better evaluate the extent of protection accorded works of architecture under both domestic and international law.

Issues Examined in the Study

Since works related to architecture are unequivocally protected under the Copyright Act and the Berne Implementation Act of 1988, the principle issues examined in this report are: (1) Whether the Copyright Act currently grants copyright owners of works related to architecture the right to prohibit the unauthorized construction of the work of architecture depicted therein; (2) If that right is not granted, whether it should be;

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[7] U.S. Adherence to the Berne Convention: Hearings Before the Subcomm. on Patents, Copyrights and Trademarks, Senate Judiciary Comm., 99th Cong., 1st & 2d Sess. (1986).

(3) Whether the Copyright Act currently grants protection to works of architecture; (4) The extent of protection for works of architecture in Berne member states; and (5) The nature and scope of alternative non-copyright forms of protection.

CHAPTER 2: PRACTICES IN THE ARCHITECTURAL PROFESSION REGARDING OWNERSHIP OF RIGHTS

Works of architecture have existed for millennia, as detailed in the previous chapter. At the time these earliest works were created, specialization, standard contracts, and copyright were unheard of. While "architecture without architects" [1] certainly takes place today, it is the exception. Contemporary architecture is an expensive undertaking, and occurs in a highly regulated environment in which zoning laws, building codes, historic preservation review committees, tort liability, and professional canons, to name but a few, play a part in allocating rights and obligations.

Given such an array of factors, it should hardly be surprising that from its inception in 1857, the "backbone" of the American Institute of Architects (AIA) has been the publication of standard "instruments of service" (contracts) and other documents concerning architects' relations with clients and builders. In 1888, the AIA joined with the National Association of Builders to create a "Uniform Contract," which was the accepted form for a quarter century. In 1911, the AIA published the first edition of a book of standard documents, which it has continued to revise and update.[2]

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[1] For criticism of professional architects as being allegedly hemmed in by existing formulas and cliches, see discussion of philosopher Ludwig Wittgenstein's creation of the Stoneborough house in Vienna, in Janik & Toulmin Wittgenstein's Vienna 207-208 (1973).

In this chapter we refer almost exclusively to architects, but in so doing fully realize that engineers and others frequently draft specifications and plans, and are, therefore, as deserving of protection. See Comment #4.

The standard clause on ownership of rights is found in AIA Document B141, Article 6.1:

> The Drawings, Specifications and other documents prepared by the Architect for this project are instruments of the Architect's service for use solely with respect to this Project and, unless otherwise provided, the Architect shall be deemed the author of these documents and shall retain all common law, statutory and other reserved rights, including the copyright. The owner shall be permitted to retain copies, including reducible copies, of the Architect's Drawings, Specifications, and other documents for information and reference in connection with the owner's use and occupancy of the Project. The Architect's Drawings, Specifications, and other documents shall not be used by the owner or others on other projects, for additions to this Project or for completion of this Project by others, unless the Architect is adjudged to be in default under this Agreement, except by agreement in writing and with appropriate compensation to the Architect.
>
> Submission or distribution of documents to meet official regulatory requirements or for similar purposes in connection with the Project is not to be construed as publication in derogation of the Architect's reserved rights. [3]

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[2] See Saylor, The American Institute of Architects' First Hundred Years 87 (1957).

[3] See Sabo, A Legal Guide to AIA Documents, A201 General Conditions, B141 Owner Architect Agreement (1987-1988).

Paragraph 4.5.1 specifies that, while disputes and claims are generally subject to arbitration, those related to "aesthetic effect" are not, and hence must be litigated.

Architects give a number of reasons for wanting to retain copyright in their drawings and specifications. First, ownership helps limit their exposure to tort liability, which may arise when plans are used to construct a building in a different environment so as to threaten the work's physical integrity (e.g., plans for a house designed for a mild, flat environment being used to build a house in a hurricane area); or, when a second building is constructed in a manner that fails to reflect revisions made to the plans during construction of the original structure; or, simply to ensure that the aesthetic integrity of the work is unimpaired.

Tort liability has also had the effect, in a number of cases, of actually altering the role of architects in the construction process. Beginning in the 1960s, AIA contracts were amended to describe the architect as "observing" rather than "supervising" construction.[4] Accordingly,

> the architect has turned over the responsibility for executing the design to the contractor who presumably has the necessary skill to accomplish this properly and safely. Even more, in sophisticated construction, the architect may simply be part of the management team that may consist of a project manager, a construction manager, and a field representative of the owner or lender. This shift in role and function, though principally in response to

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[4] See Sweet, Legal Aspects of Architecture: Engineering and Construction Services 275 (3d ed. 1985) (hereinafter cited as Sweet Treatise] and Sweet, The Architecture Profession Responds to Construction Management and Design Build: The Spotlight on AIA Documents, 46 LAW & CONTEMP. PROB. 69 (1983).

> increased liability of third parties, was also designed to recognize the shift in organization for most construction, the architect no longer being master-builder but being called in to interpret or decide disputes and making periodic observations to check the progress of the work.[5]

Under such circumstances, ownership of the plans may not vest or may not vest entirely in the architect.

A second reason architects desire to own copyright in their plans is economic: without such rights (or absent a contract to that effect) the architect will not be paid for reuse of the plans. [6] This reason has been subject to criticism in some circumstances:

> [T]he prohibition against the client using the [plans] for additions to or completion of the project can be looked upon as a device to discourage the client from retaining a new architect, or at least to make it pay compensation if it replaces the original architect. It is as if an implied term of the original retention agreement gave the design professional an option to perform any additional design services required by an addition to the original project. Hiding such "options" in the paragraph dealing with ownership of drawings and specifications can make courts suspicious of the fairness of such standardized contracts. [7]

Naturally, the role of the architect and the importance of obtaining reuse rights (either through copyright or contract) is dependent upon the type of project, the architect's reputation, and the size of the architect's firm. Architectural firms tend to be smaller than law or accounting firms. [8] Most firms (62 percent) have fewer than five employees; 84 percent have fewer than ten employees. As a consequence, 53 percent of architectural firms are organized as proprietorships; 9 percent are organized as partnerships, and 38 percent as corporations.

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[5] Sweet Treatise at 275-276.

[6] Id. at 299-300.

[7] Id. at 300.

Designing office buildings is the largest single source of income for architectural firms, accounting for 16 percent of total billings. This is followed by educational facilities (12 percent), health care facilities (10 percent), and multi-family housing, single-family housing, and commercial interiors, each of which account for 9 percent. These numbers are national and vary, understandably, by region. For example, in the Northeast, multi-family housing accounts for 19 percent of architectural firms' operating revenue and is the second most important source of income after office buildings.

Another variant is the size of the firm. Multi-family housing is the greatest source of income for firms with 10-19 employees, while single-family housing provides one-person firms with 30 percent of their business. "In general, single-family housing is more important for smaller firms and much less important for the largest ones. Firms with 20 or more employees receive less than 3 percent of their revenues from single-family housing."[9]

Architects obviously work closely with the construction industry, and their economic welfare is inextricably intertwined with the economic health of that industry. Annually, over $7 billion is spent on architectural services. To this must be added building materials, labor, and related costs such as equipment rental, interest, and taxes paid during construction. Factoring in all these costs, we spend in the United States over $400 billion a year on construction, almost 10 percent of our Gross National Product.

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[8] The information in this section is derived from the AIA FACT BOOK (1988 ED.).

[9] Id. at 21.

The role of copyright in the architectural services industry is uncertain, due to two factors. First, contracts (especially AIA standard contracts) are the principal form of ordering legal rights and remedies. Second, given a number of court opinions holding that copyright in architectural plans does not grant the right to prohibit unauthorized construction of the building depicted therein, architects have tended not to rely on copyright as much as they otherwise would. Yet, effective copyright protection can provide substantial benefits for architects, since unlike contracts, privity is not a requirement, and as a federal right, relief for copyright infringement is nationwide.

As well, since most copyright infringement suits involve single-family housing, and smaller architectural firms are responsible for the design of most single-family housing, an extension of copyright protection to prohibit the construction of substantially similar buildings based on unauthorized use of the plans that depict the building may improve the economic well-being of smaller architectural firms. Copyright protection appears to be less essential for larger firms because the types of works they design are much less likely to be copied.

An additional reason for clarification of or an increase in the scope of copyright protection is the fact that other forms of legal protection such as design patents, trademark, and unfair competition are not generally available.

CHAPTER 3: CASE LAW IN THE UNITED STATES REGARDING ARCHITECTURAL WORKS

Prior to 1978, copyright protection in the United States was divided between the states and the federal copyright statute, with the elusive concept of "publication" forming the line of demarcation. Since most works of architecture and works related to architecture were deemed to be "unpublished," a large number of early cases arose in the states under common law copyright. A few arose in federal court. Since 1978, with the general abolition of common law copyright, claims for copyright have, of course, been brought exclusively in federal court. Other forms of federal and state protection -- including design patent, trademark, unfair competition, and conversion -- have also been sought, sometimes in conjunction with copyright claims, sometimes on their own.

In light of this history, we have divided this chapter into three parts: state common law copyright decisions, federal copyright decisions, and "Other Forms of Protection."

Given the diversity of facts and the relatively large number of jurisdictions involved, it is difficult to extract black letter law from the cases. A few issues seem fairly settled, however. First, filing of architectural plans with the local permit authority does not, in and of itself, constitute a publication of the plans. Only one case held to the contrary. Similarly, delivery of copies of the plans to contractors or customers does not publish the plans. Again, only one case held to the contrary. All cases held that a work of architecture is not a copy of its plans, and most also held that a construction of a work of architecture does not publish the work of architecture or its plans. Six cases held that copyright in the plans does not extend to the structure depicted therein, while three cases held that one cannot, however, use infringing plans to erect the structure. Three decisions state in dicta that buildings are not copyrightable, while three other decisions could be read as indicating that they are. We were not able to find a single decision, though, that squarely presented the issue of a claim to copyright in a work of architecture, and certainly nothing involving the type of "fine architecture" created by America's leading architects. The evidence on this important point is, therefore, regrettably inconclusive. Even those courts that seem disposed not to protect buildings (or at least the ones before them) have found ways to punish deliberate infringers, as the Sixth Circuit recently did by awarding damages based on profits from sales of homes built by using infringing plans.

I. STATE COMMON LAW COPYRIGHT DECISIONS

CALIFORNIA

Weinstock, Lubin & Co. v. Marks, 42 P. 142 (1895). Plaintiff was the owner of a "Mechanic's Store," the front of which was "of a peculiar architecture, containing arches and alcoves, of which there was none other similar in the city of Sacramento." [1] Defendant subsequently constructed an adjoining building, described as looking exactly the same as plaintiff's and called "Mechanical Store." While requiring the defendant to indicate to the public that his store was not associated with plaintiff's, defendant was permitted to construct his building "in any style of architecture his fancy might dictate, including one identical to plaintiff's."[2]

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[1] 42 P. at 143.

Smith v. Paul, 345 P.2d 546 (Ct. App. 1st. Div. 1959). Plaintiff was a designer of homes. Defendant contractor copied the plans plaintiff had filed, pursuant to ordinance, with the Marin County building authority, and subsequently constructed a home similar to plaintiff's. The principal issues for the court were whether architectural plans were copyrightable, and, if so, whether the mandatory filing of the plans constituted a general publication, thereby divesting the architect of common law protection. [3]

The court quickly disposed of the first question by treating the plans as literary works. The second question proved more difficult. After an extensive review of the authorities, the court held:

> 1. Filing of the plans with the county building department is a limited publication and does not result in loss of common law copyright.
>
> 2. "In a completed structure the architect is not publishing a copy of his plans;" [4]
>
> 3. "A completed structure is no more a copy [of the plans] than the exhibition of an uncopyrighted moving picture film, the performance of any uncopyrighted radio script, or the

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[2] Id., at 146.

[3] Although denoted a "common law" claim by the court, protection was provided under Cal. Civ. Code 980.

[4] 345 P.2d at 550.

> broadcast of an uncopyrighted radio script...."[5]
>
> 4. "Merely viewing the interior of a house by a limited number of people... would not constitute an act of publication...(but) exhibition of the exterior to the public generally loses any common law copyright to the exterior design that may have existed prior thereto."[6]

Wallace v. Helm, 161 USPQ 121 (L.A. Sup. Ct. 1969). Plaintiff general contractor created original designs for a two story single-family dwelling and hired a drafting firm to complete detailed drawings and specifications from these designs. A house was subsequently constructed from the completed plans. The same month the house was completed, defendants decided to construct an identical house on their property, and in furtherance of this desire, asked plaintiff to sell them a copy of the plans. Plaintiff refused, whereupon defendants obtained an unauthorized copy of the plans from the drafting firm plaintiff had hired, and proceeded to construct a house based on the unauthorized copy.

In a brief decision, the court held that the building of the house from the blueprints and delivery of the blueprints to customers for their use did not constitute a general publication, and that defendant had infringed plaintiff's common law rights in the blueprints. However, because defendants did not realize any profits from construction of the residence, no profits were awarded.

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[5] Id. at 553. By "uncopyrighted," we believe the court meant not subject to federal copyright protection; however, under Section 12 of the 1909 Copyright Act, the types of works enumerated by the courts were subject to federal protection even though unpublished.

[6] Id. See also id at 555, "the exterior is copyable by anyone with sufficient draftsmanship qualities."

Shanahan v. Macco Construction Co., 36 Cal. Rptr. 584 (Ct. App. 2d Div. 1964). This case contains an extensive discussion and interpretation of Smith v. Paul, supra. In Shanahan, a case involving "tract homes," the pertinent facts were summarized in eight points by the court:

1. Plaintiffs distributed 30,000 brochures to the public containing the floor plans;
2. Four model homes "depicting" each of the floor plans were constructed and visited by approximately 60,000 people. One of these visitors, an architect, took measurements of one of the homes with permission. He thereafter prepared a detailed floor plan that almost exactly matched plaintiffs';
3. 1,435 tracts homes were built based on the plans;
4. Plaintiffs invited the public "to inspect and examine their homes, plans, elevations by practically every conceivable advertising medium;"
5. Plaintiffs twice submitted detailed plans and pictures of one of the homes to a magazine, in connection with a contest. The magazine had a circulation of over 100,000.
6. Detailed floor plans and elevations were available for inspection at sales offices, and prospective customers were free to measure the dimensions of the houses;
7. "Conditional permission" to use the plans was given to one individual;
8. Of the 250 copies of the plans Plaintiffs originally owned, Plaintiffs had only 2 or 3 in their possession at the time of trial. Some of these missing copies were given to subcontractors and financial institutions.

In rejecting Plaintiff's reliance on Smith v. Paul, the court found these differences between the two cases:

1. Smith involved the construction of only one house;
2. There was greater public inspection than in Smith;
3. There was extensive publication of brochures and advertising.

Based on these differences, the court found a general publication, and thereby forfeiture of common law copyright. [7] While there can be little disagreement on the facts, the court's conclusion that construction of the homes was a publication of the plans seems contrary to Smith.

Read v. Turner, 48 Cal. Rptr. 919 (Ct. App. 4th Div. 1966). The issue of whether construction of a house incorporating plans constitutes publication arose again in this case. Relying on Shanahan, the court held:

> [A] design may be expressed by incorporating it in a structure as well as by incorporating it in a drawing. The publication of the design may be effected by an expression in like manner, depending upon whether the method of communication discloses the design to the claimed recipient. The circulation of a drawing expressing a design communicates the design to a person who receives the drawing. The exhibition of a structure expressing the same design, because it is incorporated therein, communicates the design to those to whom the exhibition is made if it is observable by them through the exhibition.

Oakes v. Suelynn Corporation, 100 Cal. Rptr. 838 (Ct. App. 1st Div, 1972). This curious case did not involve copying, but use of architectural plans defendant had lawfully obtained in a bankruptcy proceeding. Upholding a jury verdict for defendants, the court of appeals held that defendant had not appropriated any of plaintiff's design elements in its remodeling of a ferry into an office building.

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[7] The court also dismissed an unfair competition claim based both on a pre-trial stipulation and on authority that once a general publication has occurred without securing statutory copyright, plaintiff's work was in the public domain and could, therefore, be freely used. Id. at 546.

Robert H. Jacobs, Inc. v. Westoaks Realtors, Inc., 205 Cal. Rptr. 620 (1984). Decided after general abolition of common law law copyright by the 1976 Copyright Act, the court in this case correctly found that a common claim for a post 1978 infringement of architectural plans was preempted by the Copyright Act.

COLORADO

Masterson v. McCroskie, 573 F.2d 547 (1978) (en banc). The sole issue presented in this case was whether delivery to contractors and subcontractors for bidding purposes and to assist in construction constituted a general publication. Making a distinction between the design of the home and the plans, the court held that construction of the home constituted general publication of the former but not the latter. [8] The court added in dictum that the drawing up of architectural plans by mere observation of the house would not constitute infringement. [9]

FLORIDA

Kisling v. Rothschild, 388 So. 2d 1310 (Ct. App. 5th Div. 1980), ptn. for review den. w/o opn., 397 So. 2d 779 (1981); 417 So. 2d 798 (Ct. App. 5th Div. 1982) (damages). This case presented two issues: (1) whether the standard for common law copyright in architectural plans was one of novelty; and, (2) whether filing of the plans with the county building department and showing the plans to a friend constituted a general publication. The court held that novelty was not required and that no general publication occurred.

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[8] 573 F.2d at 550. The court added that delivery of a copy of the plans to the subdivision developer in order to comply with the subdivision's covenants did not constitute publication.

[9] Id.

GEORGIA

Jones v. Spindel, 147 S.E. 2d 165 (Ct. App. Div. 2 1966); 177 S.E. 2d 187 (Ct. App. Div. 2 1970); 196 S.E. 2d 22 (Ct. App. Div. 3 1973). Spindel, an engineer, prepared drawings for prefabricated houses and provided them to Jones and the other defendants for the purpose of obtaining building permits and mortgage commitments. Defendants, without permission, copied the plans and used them for the construction of a 64 unit apartment complex. The court expressly rejected defendants' argument that the filing of the plans with the pertinent authorities constituted a general publication, and impliedly rejected their argument that the providing of the plans to others to construct prefab houses was also a general publication.

MASSACHUSETTS

Edgar H. Wood Associates, Inc. v. Skene, 197 N.E. 2d 886 (1964). Two questions were presented in this case, whether a general publication occurred: (1) upon filing of plans with the city building department; and, (2) upon authorized construction of a building depicted therein. The court answered both questions in the negative. The court's discussion of the second point is particularly interesting. It first cited approvingly a law review article to the effect that: "An architectural plan is a technical writing. It is capable of being copied only by similar technical writings, that is, by other plans, etc. A structure is the result of the plans, not a copy of them. It follows that building a structure and opening it to public gaze cannot be a publication of its plans." [10] The court then held:

> Observation or measurement of the interior and the exterior of a completed building can hardly be said to approach an accurate copy of a set of plans. We do not suggest that a common law copyright in the plans is infringed by a drawing made from observation of the interior or exterior of the buildings. Such a doctrine could lead only to a multiplicity of law suits between parties who had erected successively structures of somewhat similar design. On the other hand, the right fully to reproduce plans is a far more substantial aid to a builder unwilling to pay for architectural services than the right to make sketches or drawings of a completed structure.

The court accordingly held that the construction of the building from the plans does not constitute publication of the plans. [11]

In discussing the available relief, the court held "[i]f it should appear that [defendants'] apartments are in the process of construction or completed an injunction should not be granted." Presumably, then, an injunction would have been available if construction had not begun.

MINNESOTA

McCoy v. Grant, 174 N.W. 728 (1919), pitted the architect against the client. Copyright ownership of the plans was vested in the architect, at least in part because the defendant had promised to pay again for use of the plans.

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[10] 197 N.E.2d 894-895, citing, Katz, Copyright Protection of Architectural Plans, and Designs, 19 Law and Contemporary Problems 224 (1954).

[11] Cf. Wright v. Eisle, 83 N.Y.S. 887 (Sup. Ct. App. Div. 1903), Tuney v. Little, 186 N.Y.S. 2d 941 (Sp. C. Trial Term 1959).

MISSOURI

In Kurfiss v. Cowherd, 121 S.W. 2d 282 (1938), an architect drew up plans to modernize an old house, but did not file the plans in the permit office. After completion of the renovation, the house was open for public inspection. Defendant somehow obtained copies of the plans and used them in the construction of other houses. In finding for defendant, the court held that plaintiff's "unrestricted exhibition" of the renovated house was a publication of the plans.

NEBRASKA

Berlinghof v. Lincoln County, 257 N.W. 373 (1934), was a suit by an architect against a county over the county's reuse of plans the architect had developed for it ten years earlier during the original construction. The architect did not attempt to prohibit the subsequent reuse of his plans, but instead claimed entitlement to a commission of three and one-half percent of the cost of remodeling. Since no copying of the plans was made, the decision could have been based on the lack of copying. The Supreme Court of Nebraska, however, decided the case on the ground that:

> An architect ordinarily has no right to the ownership of a plan furnished to, accepted by, and paid for by another, and plans forming an essential part of the building contract, unless proved to be the property of the architect, are deemed to the property of the employer.

Although this passage is ambiguous -- "ownership" could refer to ownership of the physical object and not the intellectual property, in context, it appears that the court was referring to ownership of the intellectual property, apparently under a work made for hire theory.

NEW JERSEY

Krahmer v. Luing, 317 A.2d 96 (Sup. Ct. Ch. Div. 1974). This decision held that a general publication did not occur upon filing the plans with the permit authority or upon construction of the building, the court adding that the interior or exterior of a work of architecture "is copyable by anyone with sufficient draftsmanship abilities."

NEW YORK

Larkin v. Pennsylvania R. Co., 210 NYS 374 (Sup. Ct. 1925) involved a claim of copying plans and a method for the construction of a high rise office building on top of a railroad tunnel. The court found that the method was generally known in the field and that there was a lack of similarity in the appearance of the buildings.

Shaw v. Williamsville Manor, Inc., 330 N.Y.S. 2d 623 (Sup. Ct. App. Div. 1972). Expressly rejecting earlier decisions, the court held that the filing of plans with the village clerk did not constitute a general publication.

OHIO

Ballard H.T. Kirk & Associates, Inc. v. Poston, 293 N.E. 2d 102 (Ct. App. Hamilton County 1972), represents a very strict view of limited publication. Plaintiff created architectural drawings for use in constructing an apartment building. Forty-four copies of the drawings were made for subcontractors and others to use in connection with the project. No restrictions were indicated on the face of the drawings prohibiting further use or dissemination. Defendants "knowingly and maliciously converted" the plans and constructed an apartment building based on plaintiff's plans. In upholding the judgment of the trial court for defendants, the court of appeals held that plaintiff's failure to place restrictions on the further use or dissemination of the plans resulted in a general publication.

PENNSYLVANIA

Gendel v. Orr, 12 Phil. 191, 14 Copr. Office Bulletin 1067 (Ct. Common Pleas 1879). In this case, plaintiff asserted common law copyright in a porch of a "new and novel design" he had created for his residence. The court, while admiring the creativity of plaintiff's effort, dismissed the claim on the ground that by placing the porch in public view, plaintiff had (generally) published it.

Mackay v. Benjamin Franklin R&H Co., 288 Pa. 207 (1927) upheld a directed verdict against plaintiff in a trover and conversion action brought against a builder for the unauthorized use of plaintiff's plans. The judgment was based on defendant's lack of possession of the plans (an independent contractor did the actual work) and the unavailability of trover and conversion to prohibit the use of intellectual property. The court did not, however, foreclose other causes of action for the unauthorized construction of the building using the allegedly infringing plans.

UTAH

Ashworth v. Glover, 433 F.2d 315 (1967),[12] involved an infringing drive-in restaurant. After deciding that filing of the plans with the local authorities did not result in a general publication, and that plaintiff architect owned rights in the plans, due at least in part to incorporation of an American Institute of Architect's standard form that contained the following clause: (1) "all drawings, and specifications and copies thereof furnished by architect are [the architect's] property...," the court appears to have held that the architect owned common law copyright in the drive-in restaurants. This position was challenged by one the dissenting judges:

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[12] In a related case, Allen's Products Co. v. Glover, 414 P.2d 93 (1966), the owner of the buildings unsuccessfully sued for unfair competition based on the similarity of appearance of the two restaurants.

> I know of no case bearing on the question of "common law copyright" wherein the architect has been held to preserve such a right where he has constructed two buildings, one of which has been open to the public for over three years at the time in question. It might be different if this building contained some unique construction secrets. The testimony is that the only thing really unique about this building it is overall general appearance. To extend the "common law copyright" to such a case is to expand such right to lengths it has never heretofore enjoyed in recorded cases.

VERMONT [13]

O'Bryan Construction Co. v. Boise Cascade Corp., 424 A. 2d 244 (1980), presented issues of substantial similarity, the interplay between common law copyright and conversion, and the availability of quantum merit recovery.

The substantial similarity question was easily disposed of since defendant had a copy of plaintiff's plans and had submitted them to a building authority for permit purposes. When defendant later attempted to substitute the infringing plans for plaintiff's, the permit authority indicated in a letter that this was not necessary since the infringing plans "did not deviate substantially from those previously submitted." Regarding the conversion claim, the court held that while common law copyright and conversion are meant to compensate different wrongs, "care must be taken to avoid a duplicative recovery." Since infringement had been found, recovery under the conversion claim would be limited to "the value of the paper itself." On the other hand, quantum merit, designed to compensate for the fair and reasonable value of lost services, was found not to represent an award duplicative of the infringement recovery.

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[13] See also MacMillan Co. v. I.V.O.W. Corp., 495 F. Supp. 1134 (D. Vt.1980), discussed in the federal decision section, and Williams v. Mittenden Trust Co., 484 A. 2d 911 (Vt. 1984)(noncopyright forms of protection).

WYOMING

Vic Alexander & Associates v. Cheyenne Neon Sign Co., 417 P.2d 921 (1966). This case involved the design of a jewelry store front described as "wonderful architectural and engineering work." [14] Blueprints and drawings were created and provided to defendant. In the ensuing litigation over the unauthorized use of the blueprints and drawings in a different store, defendant argued that plaintiff's providing defendant with the plans and construction of the original store front based thereon constituted a general publication. The court held that it could not say, as a matter of law, that these acts constituted a general publication, and, accordingly, left such a determination for the trier of fact.

Seay v. Vialpando, 567 P.2d 285 (1977). Plaintiff drew plans and blueprints for a house he intended to build and hired contractors to construct and paint the exterior. During this construction, the contractors were supplied with copies of the plans and blueprints. After completion of plaintiff's house, one of the contractors, without authorization, used plaintiff's plans to construct a home for himself.

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[14]. 417 P.2d at 923.

Based on its earlier decision in Vic Alexander, supra, the court found there was no publication of the plans either by providing the plans to the contractors or by constructing plaintiff's home. In so finding, the court expressly held the "[u]se of the plans is what brings on the infringement, no matter how slight the infringement."[15] The court also indicated that causes of action for conversion and quantum meruit would lie.

II. FEDERAL COPYRIGHT DECISIONS

SECOND CIRCUIT

Morris European & American Express Co. v. United States, 85 F. 964 (C.C.S.D.N.Y. 1898). This unusual case involved the proper characterization of a church altar for customs purposes. Customs had classified the altar as "dressed stone," assessing a thirty.percent ad valorem duty. The importer protested, claiming, among other things, that the altar was a duty free "work of art, imported expressly for presentation to an incorporated religious society."

After hearing testimony regarding the status of the altar as a work of art, or a "work in art in architecture," the court reversed the Customs Service, writing:

> If the proportions are sufficiently symmetrical, and the lines so far free from faults as to stir the emotions of people, the work is to them a work of art. Whether it is good or bad art is a mere question of quality. This work was originally designed by one of the

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[15] 567 P.2d at 289.

> leading American artists in this style of church architecture. An artist of reputation in France made original designs for the angels, and imposed his personality upon the work. The specifications and detail drawings show this fact beyond question. Whether the design and construction show such originality of conception and perfection of execution as to mark it as the work of a genius is not the question herein. The work as an entirety confessedly falls within the accepted definition of a work of art. It represents the handiwork of an artist; it embodies something more than the mere labor of an artisan; it is a "skillful production of the beautiful in visible form." It is unnecessary to consider the contention that architectural works are not works of art, for writers such as Mr. Ruskin, and all the witnesses herein, refuse to impose a limitation which would exclude the famous churches, triumphal gates, and graceful towers of Europe. The further contention that it cannot be a work of art if adapted to a useful purpose would exclude the Ghiberti doors of Florence, or the fountains of Paris and Versailles. These conclusions render it unnecessary to consider the further claims of the importer that the altar, at least, is statuary, and that neither altar nor redodos is dressed stone.

Ketcham v. New York World's Fair/ 1939, Inc., 34 F. Supp. 657 (S.D.N.Y. 1940), aff'd, 119 F.2d 422 (2d Cir. 1941) (Mem.), involved a color scheme for buildings at the 1939 New York World's Fair. The court found that had defendant made use of plaintiff's color chart in the painting of the buildings, infringement would have resulted. Unfortunately for the plaintiff, the court found no such use was made.

American Institute of Architects v. Fenichel, 41 F. Supp. 146 (SDNY 1941). In this case, defendant made six copies of a popular standard form created by the AIA, and delivered them to owners and contractors he was dealing with. Based on an express, if not implied, right to use the forms, the court excused defendant's conduct as fair use.

Muller v. Triborough Bridge Authority, 43 F. Supp. 298 (S.D.N.Y. 1942). This straightforward case has been construed, on a number of occasions, far beyond its facts. Plaintiff was the owner of a unpublished drawing entitled "Bridge Approach," registered in Class 5 (i). Plaintiff alleged that defendant had "wrongfully and unlawfully appropriated and used said copyrighted design and plan in the design, plan, construction and operation of the Approach to Cross Bay Parkway Bridge...." [16] Defendant denied any use of the drawing or the design contained therein.

The court found that while there was "considerable similarity" between plaintiff's drawing and the defendant's bridge approach design, the design was independently conceived and executed by defendant's engineers.[17]

In dictum, the court wrote that even if defendant had used plaintiff's design, plaintiff would have no remedy under the copyright law because he was claiming an "invention" -- a system of traffic control -- and thus, copyright in his drawing "does not prevent anyone from using and applying the system of traffic separation therein set forth...." [18]

MacMillan Co. v. I.V.O.W. Corp., 495 F. Supp. 1134 (D. Vt. 1980). This common law copyright case [19] raised the question whether the supplying of plans to the client (the infringing party), without an express reservation on use or dissemination, constituted a general publication. The court held it did not. It also rejected defendant's claim that it was the author of the plans because it had provided preliminary (crude) sketches.[20]

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[16] Id. at 298.

[17] Id. at 299.

[18] Id. at 300.

[19] Federal jurisdiction was invoked under 28 U.S.C. §1332.

Demetriades v. Kaufman, 680 F. Supp. 658 (S.D.N.Y. 1988); 690 F. Supp. 289 (S.D.N.Y. 1988); 698 F. Supp. 521 (1988). Plaintiff was a real estate developer who limited his business to the construction of luxury residential homes, each of which is designed to be "unique." In the three years before the suit, plaintiff had built forty homes, no two of which were the same. [21]

In 1985, plaintiff retained a firm to design plans for a particular lot in Scarsdale, New York. Upon approval of the plans by the building authority, construction was begun, completed, and the house sold for over $2 million in a matter of months. Shortly thereafter, the Kaufmans learned that a lot on the same street as the Demetriades house was available for purchase from a different real estate developer. The Kaufmans, through a real estate agency, purchased the lot and then contracted with the second developer for construction of a house of "substantially similar design" to the Demetriades house. Sale of the lot was apparently contingent upon the second developer also being hired to build the home on the lot. The real estate agency that sold the lot also knew that the Kaufmans sought construction of a house of a design substantially identical to that of the Demetriades house.

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[20] 495 F. Supp. at 1144 n.11.

[21] The court, however, remarked: "We draw no conclusions as to the quality of the structure, but the usual appearance of the home is hardly remarkable... Although the particular combination of certain features may arguably be unique, the home's design does not appear to be radically innovative or anything akin to a signal breakthrough in residential design." 680 F. Supp. at 660.

Through one of the workmen in plaintiff's employ, the Kaufmans' developer obtained an unauthorized set of the architectural plans, which were then copied:

> [A]pparently not content with simply the pilfered plans... defendants trespassed upon [plaintiff's] property after completion of construction, entered the home, and took picture of the interior. The purpose of this extracurricular photography, it appears, was to fill in whatever details could not be supplied by the architectural plans.[22]

As the frame of the Kaufman's house was being erected, Demetriades realized the similarity to his house. He then obtained an assignment of rights from the design firm, recorded the assignment, obtained a certificate of registration from the Copyright Office, and filed suit.

The court's first decision, rendered upon plaintiff's application for a preliminary injunction, sought relief for copyright infringement, trade dress infringement under Section 43(a) of the Lanham Act, common law unfair competition and misappropriation, and deceptive business practices. Relief was denied under all claims but the copyright cause of action.

Regarding the copyright claim, certain of the defendants conceded copying and substantial similarity. The only real question, therefore, was the scope of plaintiff's copyright in his plans. Plaintiffs conceded it did not have a "general right" to prevent construction of houses imitative of his and that anyone could take photographs or draw sketches of his house and based upon these, attempt to reproduce the house.[23] Plaintiff contended, however, that because defendants copied his plans, construction of the Kaufmans' house constituted copyright infringement and that construction thereof could be enjoined. The court disagreed.

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[22] Id.

[23] Id. at 663.

Based upon an interpretation of the Supreme Court's 1879 decision in Baker v. Selden [24], the court found that "although an owner of copyrighted architectural plans is granted the right to prevent the unauthorized copying of those plans, that individual, without the benefit of a design patent, does not obtain a protectable interest in the useful article depicted by those plans." [25] "Construction of a building imitating that depicted in copyrighted architectural plans does not, consistent with Baker, constitute infringement of those plans." [26] No copyright claim was made in the house itself.

The injunctive relief the court fashioned was somewhat at odds with the approach indicated in the body of the opinion. Defendants were, of course, enjoined from further unauthorized copying of the plans. The court also, however, enjoined defendants from "relying on" any infringing copies of the plans, a prohibition which, the court recognized, would likely "shut down construction for a period of time, at least, while new plans can be drawn up and submitted to the Scarsdale Architectural Review Board for consideration." [27] This made the court's statement that it was not enjoining construction of the Kaufmans' house based on alleged infringement of the plaintiff's plans [28] somewhat difficult to understand.

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[24] 101 U.S. 99 (1879).

[25] 680 F. Supp. at 664.

[26] Id. at 666.

[27] Id. at 666 n. 13.

The court then turned to plaintiff's trade dress claim under Section 43(a) of the Lanham Act. The court was unable to find any cases extending Section 43(a) to residential developments, and expressed doubts that a residential home could qualify as a "nonfunctional good" under that section. Regarding the requirement of secondary meaning, the court used plaintiff's assertion that all his homes were unique as evidence against the existence of such meaning. In concluding remarks, the court wrote that "extending individual, residential designs would work a profound mischief in both the law and the home-building industry." [29] For similar reasons, the court found that plaintiff would not prevail on the remaining state claims.

The court's second opinion was issued four months later. Before the court was: (1) plaintiff's motion for partial summary judgment on the issue of copyright liability against the Kaufmans, the second developer, and the firm that copied the plans; (2) the real estate agency's motion for summary judgment on the copyright claims; (3) all the defendants' motions for summary judgment on the trade dress claim.

Plaintiff's copyright summary judgment motion on liability was granted since defendants, with the exception of the Kaufmans' real estate agents, did not oppose it. Summary judgment in favor of the real estate agents was granted since the court found they had not induced, caused, or materially contributed to the infringement, despite their awareness that the house was to be substantially similar and their profiting from the sale of the lot on which that house was built.

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[28] Id. at 666.

[29] Id. at 669-670.

Regarding the unfair competition claim, plaintiff switched legal theories from trade dress to unauthorized use of the infringing plans of the name "Demetriades" as a trademark. The court, therefore, granted summary judgment in favor of defendants on the trade dress claim, but allowed repleading of the trademark assertion.

The most recent Demetriades opinion was rendered on October 27, 1988. The opinion addressed defendants' motions to dismiss (or for summary judgment on) all claims other than the damage part of the copyright claim. Plaintiff also asserted a claim for misappropriation of certain interior features of his house. We focus here on this claim. [30]

Plaintiff's claim was directed toward the "designs of the cabinetry, molding and other detail work" [31] which he likened to trade secrets. The court, however, rejected the trade secret analogy "out of hand," as well as defendant's assertion that because plaintiff's trade dress claim had been dismissed, the misappropriation claim must be too.[32] Based on New York state court decisions finding a protectible property interest in the result of an individual's "labor, skill, expenditure, name and repetition," the court held "[t]here can be little doubt that the design features in question, are the product of plaintiff's skill and labor, thereby bringing the subject matter of this claim within the all-encompassing definition of 'property' fashioned by the New York judiciary."[33] Analogizing to New York common law general publication rules, the court held, however, that plaintiff as a designer- developer lost his right therein once the "home has been sold and title has passed."[34] The court did indicate that an action for trespass or theft brought by the home owner might be available at this point.[35]

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[30] At the outset, the court held that to the extent the misappropriation alleged "wrongful appropriation of plaintiff's plans,... it is preempted" by Section 301 of the Copyright Act. 698 F. Supp. at 521.

[31] Id. at 526 n.5.

[32] Id. at 526.

THIRD CIRCUIT

Meltzer v. Zoller, 520 F. Supp. 847 (D.N.J. 1982). The somewhat complicated facts in this case can be reduced to two questions: (1) substantial similarity; and, (2) ownership. Plaintiffs, a couple, desired a "semi"-custom house to be built. The qualifier "semi" is important, since, although plaintiffs provided "thumbnail sketches" indicating details, such as where nook and crannies were to be in the bedrooms, as well as where windows and lighting fixtures were to be in certain rooms, the testimony revealed that plaintiffs looked at, and agreed to have substantially most of the house patterned after an existing home, the plans for which were owned by one of the defendants. No mention was ever made of copyright.

In examining the issue of ownership of the plans, the court found that architectural plans are not within one of the nine enumerated categories in the second subdivision of the definition of "work made for hire" in Section 101 of the Act, and that defendants were clearly not "employees" of the plaintiffs under the first subdivision thereof. The court also rejected plaintiff's claim that they were the creators of the plans, finding they had only contributed ideas. [36] Accordingly, plaintiffs were not the author-owners of the plans. [37]

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[33] Id.

[34] Id.

[35] Id.

FOURTH CIRCUIT

Associated Hosts of California, Inc. v. Moss., 207 USPQ 973 (W.D.N.C. 1979). On a motion for a preliminary injunction, the court enjoined defendant from copying plaintiff's plans and drawings for a restaurant. What makes the case noteworthy is that defendant's "substantially identical" drawings were derived entirely by copying from plaintiff's restaurant; there was no evidence defendant had access to plaintiff's plans or drawings.

Acorn Structures, Inc. v. Swantz, 846 F.2d 923 (4th Cir. 1988). This was a diversity action for breach of contract, conversion, and unjust enrichment arising out of the unauthorized use (but not copying) of architectural plans. The district court had granted defendant's motion to dismiss on the ground that the contract cause of action was preempted as falling within the subject matter of the Copyright Act.

The court of appeals reversed, holding that the claim arose out the use provisions of the contract and, therefore, did not come within the scope of rights granted in the Act.

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[36] For the same reason, the court rejected plaintiffs' assertion of joint authorship. Id.

[37] Id.

FIFTH CIRCUIT

De Silva Construction Corp. v. Herrald, 213 F. Supp. 184 (M.D. Fla. 1962), involved a typical fact pattern. Plaintiff builder constructed a model home and filed the plans thereto with the local permit authority. Defendants saw the model home, liked it, but hired someone else to build it. Plaintiff sued, claiming that construction of a substantially similar house would violate copyright in its plans. What is unusual about the case is the holding that the filing of the plans with the permit authority constituted a general publication and forfeiture of common law copyright.[38]

The court went further, declaring:

> The protection extended by Congress to the proprietor of a copyright in architectural plans does not encompass the protection of the buildings or structures themselves, but is limited only to the plans. The Copyright Act itself is silent on this point. However, it appears to be the unanimous view of respected text writers that, under the current copyright laws of the United States, the architect does not have the exclusive right to build structures embodied in his technical writings.[39]

One of the sources cited by the Court, a 1959 study prepared for the Copyright Office, qualified this general rule by noting:

> while the law on this point is not entirely clear, it appears probable, from the various court decisions cited above, that copyrighted architectural plans are not now protected against their use in building a structure, except as regards a copyrighted design for a structure deemed to be a "work of art." In the broad area of architectural structures,

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[38] Id. at 194-196.

[39] Id. at 195. The court also found that buildings were not "copies" of the plans and could not "publish" them. Id. at 196.

> those constituting "works of art" would seem to be relatively rare.[40]

Imperial Homes Corp. v. Lamont, 458 F.2d 895 (5th Cir. 1972). Plaintiff was a builder and seller of residential homes and the registered copyright owner of the plans for homes that it subsequently constructed. As part of its sales promotion, it prepared an advertising brochure which contained only the floor plans. While no copyright was asserted in the brochure, the brochure did note copyright in the plans.

Defendants visited one of plaintiff's houses, where they obtained one of the brochures and made detailed observations and measurements of the house. They were not shown, and did not obtain, a copy of the plans. Defendants subsequently developed a set of drawings illustrating the way in which their house was to be constructed. The end result was one duplicative of plaintiffs' houses.

On appeal from a judgment for defendants, the Fifth Circuit quickly reversed the trial court's holding that publication of the floor plan in the brochure resulted in an abandonment of copyright in the floor plan. The court of appeals turned to the question of whether reproduction of the floor plans as reproduced in the brochure would be an infringement, holding it would.[41]

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[40] COPYRIGHT OFFICE STUDY NO. 27, Strauss, Copyright in Architectural Works 70-71 (1959). Senate Committee Print, 86th Cong., 2d Sess. 1961. Copyright Law Revision Studies.

[41] 458 F.2d 895.

In answering this latter question, the court reviewed the Supreme Court's 1879 decision in Baker v. Selden,[42] and interpreted it as follows as applied to architectural drawings:

> In terms of an architectural drawing, the Baker v. Selden rationale would assert that no architect who copyrights his blueprints would thereby acquire a monopoly on the right to build a house with 2 x 4s or a pitched roof or with a slab foundation or any particular feature, no matter how unique. The court was concerned that copyright privileges might result in vesting exclusive use rights which only a patent could confer. We therefore interpret this decision as holding that a descriptive copyright may not extend an exclusive right to the use of the described art itself lest originality of description should preempt non-novel invention. Thus, no copyrighted architectural plans under 5 (i) [of the 1909 Act] may clothe their author with the exclusive right to reproduce the dwelling pictured. However, nothing in Baker v. Selden prevents such a copyright from vesting the law's grant of an exclusive right to make copies of the copyrighted plans so as to instruct a would be builder on how to proceed to construct the dwelling pictured.[43]

The court's leap from 2x4s, pitched roofs, and slab foundations to an entire dwelling as depicted in plans is unexplained and questionable. Nor does the case present the question of whether a building may itself contain substantial protectible sculptural design elements of a conceptually separable nature.

Ga-On Homes, Inc. v. Spitzer Homes, Inc., 178 U.S.P.Q. 183 (MD Fla. 1973). The Imperial Homes case was reversed and remanded for trial. While awaiting trial, the original judge died and the case was reassigned to a judge who, at that time, had yet another case raising infringement of architectural works, Ga-On Homes, Inc. v. Spitzer Homes, Inc.

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[42] 101 U.S. 99 (1879). This decision is discussed in detail in Ch 8.

[43] Id.

In this case, defendant home buyers visited plaintiff's model home, liked it, but disliked the salesman's "high-pressure tactics." They then went to a different builder and told him they liked plaintiff's home but wanted a few changes. The second builder just happened to have a copy of the plans for the house in question, and upon being hired by the couple, built a house substantially similar to plaintiff's.

The interesting part of the court's opinion is its discussion of plaintiff's copyrightable interest and its infringement:

> I don't think you could build a house, in a modern home in America, without having a kitchen and a bedroom and a family room. That has even become almost a necessity. But the peculiar arrangement of them sometimes results in a design concept which, when all put together, is an appealing saleable product. That is the concept that can be copyrighted and was copyrighted.[44]

Regarding substantial similarity, the court stated "the addition of the family room and the rearrangement of the kitchen, with the required change in doors, was not such a substantial change that it would make the two plans substantially different."[45]

In Kent v. Revere, CCH COPR. L. DEC. Para. 26,001 (M.D.Fla. 1985), defendant asserted a weak claim of independent creation of "strikingly similar" architectural plans for a residence. Rejecting this claim, the court found access, copying and infringement, but awarded only $750 in statutory damages. In a questionable aside, the court wrote:

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[44] 178 U.S.P.Q. at 185.

[45] Id. at 186.

> Arguably, copyright infringement cannot occur without access to the technical drawings rather than access merely to the promotional floor plans. However, defendant did not raise this issue.[46]

Schuchart Associates v. Solo Serve Corp., 540 F. Supp. 928 (W.D. Tex. 1982); 220 USPQ 170 (W.D. Tex. 1983). Defendant was the owner of three existing department stores in San Antonio, Texas. Defendant desired to build a fourth store at a particular shopping center. The developer of the center hired plaintiff architectural firm and plaintiff engineering firm to prepare drawings and specifications for the new store. Defendant wished this store to have the same general layout as one of its other stores, but was unable to locate the plans for this earlier store. The architectural firm thereupon created architectural specifications[47] for the new store. These specifications contained a standard American Institute of Architects ownership clause in which the architect was stated to be the copyright owner of the drawings. No notice was placed on the specifications, however. It is not clear what contract language, if any, regarding ownership was in the contract with plaintiff engineering firm, but the firm's drawings did have a proper copyright notice in its name.

A few months later, defendant entered into negotiations to build a fifth store at yet a different shopping center. An agreement to do so was entered into; however, under the terms of the contract, the shopping center developer and not defendant had the right to choose the architects. The developer chose a different architect than plaintiff even though the fifth store was to be of the "same standard of quality" as the other stores. In order to ensure this standard was met, defendant provided the developer's architects with a set of plaintiffs' drawings and specifications. The developer's architects photocopied 58.8 percent of the architectural specifications, 7.7 percent of the architectural drawings, 40 percent of the engineering/mechanical specifications, and 25 percent of the engineering/mechanical drawings.[48] Plaintiffs found out about the arrangement for the fifth store and the photocopying, and sued.

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[46] Para. 26,001 at p. 20,601.

[47] 220 U.S.P.Q. 170. Four types of works were at issue: (1) architectural drawings; (2) architectural specifications; (3) electrical/mechanical drawings; (4) electrical/mechanical specifications.

The court's first opinion was issued on defendants' motion for summary judgment. The court found no evidence the developer of the shoppping center where the fifth store was located had copied plaintiffs' plans, adding:

> [E]ven if the Ingram Square Group Defendants can be charged with using plans that infringed the copyrights of plaintiffs, the use of such plans cannot form the basis of infringement liability. Copyrighted architectural plans do not clothe their author with the exclusive right to construct the structure depicted in the drawings.[49]

The court then addressed plaintiffs' claim that defendants' failure to "independently create, produce, or distribute ... architectural and engineering drawings and specifications" constituted unfair competition. Defendants, not surprisingly, claimed this cause of action was preempted by

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[48] Id. at 174.

[49] 540 F. Supp. at 941.

Section 301 of the Copyright Act. The court agreed, finding that the subject matter -- architectural plans -- was within the subject matter protected by Section 102 and that the right sought to be protected-- creation and distribution -- was equivalent to rights granted in Section 106. [50]

Plaintiffs were successful, however, in avoiding preemption of their claim for quantum meruit, since that claim was based on recovery for the value of services (viz., unauthorized use of the plans), [51] a decision consistent with the dismissal of the copyright claim for use of plans.

The court's second opinion was issued after a six day, nonjury trial. The court began its opinion by dismissing the claim of contributory infringement against defendant store owner since he did not know the other defendants had copied the plans and did not induce them to copy them. The court upheld the use of "boilerplate" AIA contract language on ownership as giving sufficient notice that Plaintiff architects and not the store owner retained rights in the plans. [52]

In one of the few instances of such an argument, defendants asserted architectural plans and drawings are not copyrightable. The court easily disposed of the argument, noting that technical drawings are included within the definition of "pictorial, graphic, and sculptural works," and that the 1976 House Judiciary Committee report states "an architect's plans and drawings [are], of course, ... protected by copyright... ." [53] Defendants also claimed the drawings and specifications were not sufficiently "original" or "creative" to be copyrightable, an argument the court also disposed of quickly. [54]

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[50] Id. at 942-944.

[51] Id. at 945-948.

[52] 220 U.S.P.Q. at 177. Another pertinent fact was the actual copyright notice affixed by plaintiff engineering firm.

The next issue concerned publication and notice. Adopting a common law approach, the court found:

> [L]ogic dictates that the kinds of distributions ... described as business necessities in the architectural and engineering professions do not carry with them the right to further diffuse, reproduce, distribute or sell the plans and specifications without the professionals' permission or some additional fee paid for these additional rights. [55]

Defendants asserted a number of other defenses, none of which are directly relevant. [56] The more relevant issue was assessing the amount of actual damages. Based (allegedly) on Sections 504(a)(1) and (b) of the Act, the Court awarded the following damages:

1. $1,000 to Plaintiff engineers for his "lack of productivity when he learned of Defendants' copying of his work;"

2. $2,414.25 to plaintiff architects, calculated as the percentage of defendant architects' profits attributable to the copying; and,

3. $872.57 to plaintiff engineers from defendant drafting company, calculated as a percentage

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[53] *Id*. at 177, citing H.R. Rep. No. 1476, 94th Cong., 2d Sess. 55 (1976).

[54] *Id*. at 178.

[55] *Id*. at 180.

[56] These included fair use, abandonment, laches, estoppel, and innocent intent. *Id*. at 181-185.

> of defendants' profits attributable to copying. [57]

A permanent injunction was granted prohibiting defendants from "copying, marketing, initiating, transcribing, using for commercial purposes or otherwise disposing of plaintiffs' drawings and specifications." [58]

Gemcraft Homes Inc. v. Sumurdy, 688 F. Supp. 289 (E.D. Tex. 1988), presented issues of copyright infringement and preemption of state causes of action for conversion and tortious interference with contract, arising out of former employees' alleged theft, copying and subsequent use of architectural plans to build "virtually identical" tract houses. In finding these claims preempted, the court added in dicta, "there is no allegation that defendants derived their plan from one of plaintiff's actual buildings. This allegation would not be preempted because the building is not within the subject matter of copyright." [59]

SIXTH CIRCUIT

Scholz Homes, Inc. v. Maddox, 36 COPYRIGHT OFFICE BULLETIN 569 (W.D. Ky. 1965), aff'd, 379 F.2d 84 (6th Cir. 1967) raised far more issues than it decided, and the one issue it did decide was resolved in a controversial manner. [60]

In Scholz, plaintiff builder created original plans as well as a brochure containing reproductions of the plan. In the resulting infringement suit over a substantially similar house, the trial court dismissed the action upon crediting defendants' testimony that they never saw plaintiff's plans, [61] and, upon a holding that plaintiff's copyright in the plans did not extend to construction of the house. [62]

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[57] Id. at 185-186.

[58] Id. at 191 (emphasis added).

[59] 688 F.Supp. at 295 n. 12.

[60] See criticism of this decision in Imperial Homes Corp. v. Lamont, 485 F. 2d 895 (5th Cir. 1972).

On appeal, the Sixth Circuit affirmed judgment based on its view that plaintiff's interest in the brochure was limited "to preserv[ing] its value as an advertising medium and not [as] giv[ing] [Plaintiff] the exclusive right to copy the plans depicted therein." [63]

Also of interest was the court's interpretation of Baker v. Selden. Although indicating that architectural plans could theoretically be treated differently from books so as to prohibit the unauthorized making of plans and construction of substantially similar buildings, [64] the court stated:

> It is far less obvious that architectural plans are prepared for the purpose of instructing the general public as to how the depicted structure might be built. Rather, they are often prepared so that they may be used in the building of unique structures, or at least structures limited in number. If the Copyright Statute protected merely against the vending of plans instead of against their unauthorized use, it would therefore fail to afford a form of protection architects might strongly desire. This protection would most effectively be provided by holding the

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[61] At least one of the defendants had a copy of the brochure. The case seems to have proceeded on infringement of the plans as reproduced in the brochure. The courts, however, treated the case as one for infringement of the brochure.

[62] 36 COPYRIGHT OFFICE BULLETIN at 572.

[63] 379 F. 2d at 87.

[64] Id. at 86.

> unauthorized construction of a building according to a copyrighted plan to be an infringement; if Baker is followed to the extent of holding that the possession of the copyright in the plans gives no exclusive right to construct the building, then protection could be provided by declaring the making of unauthorized copies of the plans to be an infringement.[65]

Due to its disposition of the case, the court did not, however, decide these intriguing possibilities.

The Herman Frankel Organization v. Tegman, 376 F. Supp. 1051 (E.D. Mich. 1973) (Joiner, J.), once again involved architectural plans embodied in a brochure. Unlike the court of appeals in Scholz, supra, the district court here found both a valid copyright in the plans and infringement holding that "[a] person should ... be able to prevent another from copying copyrighted houseplans and using them to build the house." The principal distinguishing fact between the two cases was the admitted copying in Tegman, a fact that would be irrelevant if the brochure was not subject to protection.

The Herman Frankel Organization v. Wolfe, 184 USPQ 813 (E.D. Mich. 1974) (Joiner, J.). Judge Joiner and the Herman Frankel Organization, with a different defendant, faced questions surrounding copyright and architectural works eleven months later. Defendant visited one of plaintiff's construction sites and stole a set of plaintiff's copyrighted plans and elevations for use in constructing a similar home for a client. The court found defendant copied between 70 to 80 percent of plaintiff's plans. After defendant created a new set of architectural plans, the court dissolved the injunction.[66] Given such behavior, the court's opinion understandably addressed only the question of damages, which were based on the usual architect's fee for preparing drawings.

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[65] Id.

Wickham v. Knoxville Int'l Energy Exposition, Inc., 555 F. Supp. 154 (E.D. Tenn. 1983), aff'd, 739 F. 2d 1094 (6th Cir. 1984). This suit involved the "Sunsphere" tower constructed for the 1982 World's Fair in Knoxville, Tennessee. Plaintiff was the executor for an artist who had earlier submitted an unsuccessful design for the tower. In reviewing the two designs, the court was "impressed by the virtual absence of similarity of specific features between [the]... designs."[67] The court also noted uncontroverted evidence that "economic and engineering considerations dictated the height and structural steel design at the ... tower. ... To the extent that defendants' Sunsphere design is functional, it cannot be an unlawful infringement."[68]

On appeal, the Sixth Circuit affirmed with a brief discussion of substantial similarity.

Robert R. Jones Associates, Inc. v. Nino Homes, CCH CORP. L. REP. Para. 26,165 (E.D. Mich. 1987); rev'd, 858 F. 2d 274 (6th Cir. 1988). Plaintiff was a builder of custom homes and the copyright owner of the plans thereto. Defendant was alleged to have duplicated an abridged version of one of the plans and used it to build seven substantially similar houses less than two miles from the subdivision where plaintiff was constructing his house. The evidence showed that in admittedly copying 80 percent of plaintiff's plans, defendant deliberately obscured plaintiff's name and omitted plaintiff's copyright notice.

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[66] A portion of the injunction enjoining copying of plaintiff's plans remained in effect.

[67] 555 F.Supp. at 155.

[68] Id. at 156. It is unclear why the functional nature of defendants' work would excuse infringement unless those same functional necessities applied to planitff's design.

Infringement being easily found, the trial court turned to damages. In order to provide "an effective sanction for enforcement of the copyright policy," the trial court awarded plaintiff defendant's profits from the sales of the houses, a total of $86,320. On appeal, defendant contested the finding of infringement, based on alleged inadmissible testimony, a challenge that was rejected. Defendant also argued that the amount of damages should be limited to the value of the architectural plans. The court of appeals disagreed, but did, however, modify the award of damages. Before it did so, though, it engaged in an extended discussion of the nature of protection for architectural works.

The court began by noting the effect of Section 113(b) of the Act.[69] Since a building or a house "undoubtedly" falls within the definition of a "useful article" in Section 101, [70] the court held:

> the owner of a copyright in architectural plans has statutory copyright protection in the building depicted in those plans only to

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[69] Section 113(b) reads: "This title does not afford, to the owner of copyright in a work that portrays a useful article as such, any greater or lesser rights with respect to the making, distribution, or display of the useful article so portrayed than those afforded to such works under the law, whether title 17 or the common law or statutes of a State, in effect on December 31, 1977, as held applicable and construed by a court in an action brought under this title." 17 U.S.C. §113 (b) (1978).

[70] 17 U.S.C. §101 (1978): "A 'useful article' is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a 'useful article.'"

> the extent that such protection was recognized by the law prior to January 1, 1978. The limitations of this protection were initially set by the Supreme Court in Baker v. Selden, 101 U.S. 99 (1879).[71]

After reviewing the dicta Baker v. Selden analysis regarding "explanation" and "use," the court stated:

> The doctrine enunciated in Baker v. Selden is particularly problematic where architectural plans are the copyrighted items because the principal value of such creative works lies in their use in constructing a building. If Baker is applied strictly, and the Copyright Act is interpreted as merely prohibiting others from selling copyrighted plans and not from using the plans to construct other buildings, then the statute may not afford the kind of protection necessary to give architects adequate incentive to create new architectural designs. Conversely, giving the owner of a copyright in architectural plans the right to prevent others from constructing buildings substantially similar to the one depicted in the copyrighted plans, without requiring the architect to show that the design is novel as opposed to merely original would give architects unwarranted monopoly powers with the result that the costs of houses and other buildings would rise unnecessarily. Other courts have also struggled to balance these competing concerns -- to remain faithful to Baker, yet afford architects the protection Congress clearly intended to provide them.[72]

One such decision, of course, was the Sixth Circuit's own Scholz Homes, Inc. v. Maddox, discussed above. After reviewing Scholz and other opinions, the court of appeals formulated the following "rule:"

> [O]ne may construct a house which is identical to a house depicted in copyrighted architec-

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[71] 858 F.2d at 278.

[72] Id. at 279.

> tural plans, but one may not directly copy those plans and then use the infringing copy to construct the house. As a logical extension of this rule, we hold that, where someone makes infringing copies of another's copyrighted architectural plans, the damages recoverable by the copyright owner include the losses suffered as a result of the infringer's subsequent use of the infringing copies.
>
> The same result would not necessarily obtain if the alleged infringer merely made houses which were substantially similar to the house depicted in the copyrighted plans.[73]

SEVENTH CIRCUIT

Joseph J. Legat Architects v. United States Development Corp., 601 F. Supp. 672; 625 F. Supp. 293 (N.D. Ill. 1985). In denying defendant developer's motion to dismiss for lack of federal question jurisdiction in its first opinion, the court rejected defendant's claim that plaintiff architect's suit allegedly concerned only title to architectural plans, and as such sounded in contract. Noting that plaintiff asserted unauthorized copying and use by defendant, the court held the case was, instead, one "arising under" the Copyright Act.

The court's second opinion was issued in response to plaintiff's motion for a preliminary injunction and defendants' motion for summary judgment. Briefly, the facts are follows. Plaintiff architectural firm contracted with defendants for plaintiff to draw up architectural plans for a federally subsidized housing project. The agreement used a standard AIA contract, containing a provision vesting ownership in the drawings and specifications in plaintiff. After the plans were submitted, federal and state regulations changed. Plaintiff asserted it then altered its plans to bring them into conformity with the new regulations. Defendants disputed this and refused to pay the balance of plaintiff's fee.

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[73] Id. at 280, n.5.

Plaintiff sued under fifteen different counts including copyright. In an unusual injection of unfair competition principles into a copyright infringement analysis, the court found that, while the parties' contract permitted defendants to use the plans as necessary to construct the project (even if they were in default of the contract), they did not have the contractual right to copy and file the plans "in a way that suggested [defendants], not [plaintiff] was the architect who created the plans... . This would be plain infringement if proved." [74]

Defendants countered by asserting they were the author of the plans under the work made for doctrine. The court disagreed. Noting that architectural plans were not within the enumerated categories of specially ordered or commissioned works, the court rejected defendants' characterization of plaintiff as an "employee" within the first subdivision of the definition of work made for hire in Section 101. [75]

McNabb Bennett & Associates, Inc. v. Terp Meyers Architects, No. 85 C8792 (N.D. Ill. filed March 10, 1987.) Plaintiff alleged copyright infringement, unfair competition, quantum meruit, conversion, and tortious interference with contract, arising out of allegations that defendants, without permission, reproduced plaintiff's architectural drawings and passed them off as defendants'. Defendants asserted the claims were preempted by Section 301 of the Copyright Act. Plaintiff argued the claims involved not merely reproduction but misappropriation of its "time, effort, skill, and expense." Despite the inartful nature of plaintiff's arguments, the court found only one of the claims preempted -- and that only because it was "unpermissibly vague."

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[74] 625 F. Supp. at 297. See also id. at 303. The court, in analyzing Plaintiff's Lanham Act Section 43(a) claim, similarly found that these facts would support a 43(a) claim. Id. at 299-300; 303-304.

[75] Id. at 297-299.

Johnstone v. Fox, CCH COPR. L. REP. Para. 26, 187 (N.D. Ill. 1987). This case involved plans for kitchen remodeling. Defendant homeowner had solicited plaintiff's bid for the job, and, over the course of a few months, plaintiff had submitted a series of drawings and plans. For various reasons, defendant did not hire plaintiff for the remodeling. Plaintiff subsequently hired a different contractor and sent him plaintiff's drawings and layouts. The contractor came to defendant's home and drafted a series of working drawings for the kitchen. Upon completion of the kitchen, plaintiff found out about the use of her work in a magazine article praising the kitchen and reproducing its floor plan. Suit followed.

The court's opinion was on cross motions for summary judgment, and touched on two issues: ownership and liability. Among other claims, defendant homeowner asserted plaintiff did not posses a valid copyright because she did not independently create the work, allegedly relying instead upon defendant's ideas. The court found that even if true this did not "restrict [plaintiff's] ability to copyright her expression of the ideas." Defendant also claimed she was a joint author of the work. The court noted:

> [I]t is ordinarily the custom that mere involvement by a client in the preparation of architectural plans will not make the client an author of the plans... . However, a client who actively participates in preparing the

> work and controls the development of the design may be able to overcome this general role.[76]

On the record before it, the court could not determine the extent of the client's participation -- which plaintiff disputed. Regarding liability, even though defendant homeowner did not copy plaintiff's plans, the court found it was reasonable to infer that she had worked in conjunction with the contractor, who had copied the plans provided by defendant, and that defendant benefitted from the copying.

EIGHTH CIRCUIT

Nucor Corp. v. Tennessee Forging Steel, 339 F. Supp. 1305 (W.D. Ark.); aff'd in part rev'd in part, 786 F.2d 386 (8th Cir. 1972); 513 F. 2d 151 (8th Cir. 1975), involved plans for a joint manufacturing plant. These plans were created by plaintiff's drafting department. Upon completion, plaintiff's manager of construction sent copies to contractors and subcontractors interested in bidding on a new plant plaintiff was building. Defendant subsequently contacted the manager in connection with a proposed plant in another state, and obtained copies of the plans. Shortly thereafter, the manager resigned from plaintiff, set up his own consulting firm, and in this capacity assisted defendant in using these plans for construction of the second plant. Given the lack of limitations on the distribution of the plans, the trial court held plaintiff had forfeited its common law copyright in the plans through a general publication. As an alternative ground, the court found no substantial similarity between the plans.[77]

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[76] CCH COPR. L. REP. Para. 26,187, at p. 26,408.

[77] 339 F. Supp. at 1309-1310.

On appeal, the defendant argued the plans were uncopyrightable. The Eighth Circuit disagreed: "While the concept of a T-shaped building is not entitled to copyright protection, detailed plans and drawings of a specific building are." [78] The court of appeals also disagreed with the trial court's holding on general publication, holding:

> [A] distribution of plans to potential contractors and subcontractors for bidding purposes does not constitute a general publication... . This is true even though the plans are not marked confidential, are not required to be returned, and can be obtained without paying a deposit... .
>
> [Moreover], an owner does not lose his common law copyright by permitting interested persons to view and inspect a building and after construction... . We do not believe that displaying a building during or after construction, or publishing photographs of it, can be said to be the equivalent of publishing the building plans. While the observation of the building in person or through photographs may provide the basis for designing a similar building through a trained observer's initiative, it cannot provide the excuse for copying from plans without permission.
>
> [Finally] the distribution of catalogs and annual reports which included photographs of the exterior ... does not constitute a general publication of [the plans]. [79]

The court of appeals also disagreed with the trial court's judgment of no substantial similarity, finding that material portions of defendants' plans were "exact reproductions" of plaintiff's. [80]

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[78] 476 F. 2d at 390.

[79] 476 F. 2d. at 390-391.

[80] Id. at 391. The trial court subsequently erroneously submitted the case to a jury on defendants' theory that it had not used the plans. The court of appeals reversed. 513 F.2d 151 (8th Cir. 1975).

Aitken, Hazen, Hoffman & Miller P.C. v. Empire Construction Co., 542 F. Supp. 252 (D. Neb.). Plaintiff was hired by defendant under an oral agreement (with no mention of copyright) to prepare plans for an apartment complex. Because defendant wished this complex to bear a similarity to others it had previously built, it provided plaintiff with design features for certain elements, such as balconies, fireplaces, and chimneys. Without plaintiff's knowledge or permission, defendant, upon completion of the complex, used the plans for a second complex down the block from the first.[81]

In the resulting infringement suit, defendant claimed: (1) the plans were owned by it under the work made for hire doctrine; (2) it was a work of joint authorship; (3) its use was a fair use. The court rejected all three arguments. It found that plaintiff was an independent contractor whose creations were governed by the standards of its profession. Thus, while defendant had the right to direct the result of plaintiff's work, it had no right to direct "the details and means by which that result was accomplished."[82] Defendant's contribution of ideas for the placement of balconies, etc. was found to be a de minimis contribution, insufficient to establish joint authorship.[83] Finally, defendant's copy of plaintiff's plans was a "mirror image" of plaintiff's and was for purely commercial purposes. As such, it was ineligible for the fair use privilege.[84]

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[81] Copies of the plans were made and deposited with the permit authority.

[82] 542 F.Supp. at 257-258.

[83] Id. at 259.

[84] Id. at 260.

NINTH CIRCUIT

May v. Bray, 30 Copyright Office Bulletin 435 (S.D. Cal. 1955). This intriguing case regrettably has few reported facts, the court's opinion being merely a judgment of a permanent injunction. That judgment, however, enjoined defendant from:

> 1. Infringing plaintiffs' said copyrighted architectural drawings by the unauthorized printing, reprinting, copying, publishing, or vending of plaintiffs' said architectural drawings;
>
> 2. Infringing plaintiffs' said copyrighted architectural drawings by the printing, reprinting, publishing, copying or vending copies of plaintiffs' said architectural drawings prepared by defendant William M. Bray;
>
> 3. Using plaintiffs' said architectural drawings in the construction of houses in said Bristol Manor Tract, or elsewhere, unless licensed by plaintiffs Cliff May and Christian E. Choate, or by plaintiff Ranch House Supply Corporation, a corporation;
>
> 4. Using defendant William M. Bray's copies of plaintiffs' said copyrighted drawings in the construction of houses in said Bristol Manor Tract, or elsewhere;
>
> 5. Constructing houses in said Bristol Manor Tract, or elsewhere, which substantially imitate plaintiffs' unique combination of designs, features, materials, methods and technique as said combination is set forth in plaintiffs' said architectural drawings, Exhibit 2 herein;
>
> 6. Constructing any houses in said Bristol Manor Subdivision, or elsewhere, deceptively similar in appearance, style and character to those of genuine "Cliff May Ranch Houses;"
>
> That defendants individually, BRISTOL DEVELOPMENT COMPANY, a corporation, and FEDERATED CONSTRUCTION COMPANY, a corporation, their officers, agents and employees, be and they are hereby ordered to deliver up to the Clerk of the Court for cancellation and destruction, all copies of said architectural drawings, tracings, ozalid prints and

> blueprints prepared by defendant William M. Bray of said Bristol Manor houses.

Hedbla v. McCool, 476 F.2d 1773 (9th Cir. 1973), is an aberrational decision, holding that because plaintiff architects were unlicensed in the state, their contract with defendants was illegal and unenforceable. Thus, defendants' unauthorized use of plans protected under common law copyright was excused.

May v. Morganelli - Heumann & Associates, 618 F.2d 1363 (9th Cir. 1980), involved, principally, issues of custom in the architectural field, and work made for hire. The decision on appeal was from a grant of summary judgment for defendant and the opinion accordingly is colored by the standard for such a grant. In reversing the trial court's ruling that the custom in the architectural field was to permit a client to freely use preliminary drawings even after discharge of the architect, the court found there was a genuine dispute as to this custom. The court also found that assertion of a custom of the architect owning the copyright as contrasted with the then general legal presumption that the commissioning party would own the copyright made summary judgment inappropriate. [85]

Mention v. Gessell, 714 F.2d 87 (9th Cir. 1983). Plaintiff alleged common law infringement of its architectural plans, based on defendants' copying and use of the plan in constructing migrant labor housing. Defendant obtained plaintiff's plans from a county housing authority, which had presumably obtained them when plaintiff had earlier constructed such housing in a different state and had sent copies of the plans to potential contractors and subcontractors, as well as to a copying service, plan exchange centers, several state and county agencies, and the Farmers Home Administration.

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[85] On January 13, 1989, in Dumas v. Gommerman, 865 F.2d 1093 (9th Cir. 1989) the court adopted a "formal salaried employee" approach to work made for hire. Recently, the Supreme Court affirmed the decision of the District of Columbia Court of Appeals in Community for Creative Non-Violence v. Reid, 846 F.2d 1485 (D.C. Cir. 1988), which had adopted an agency law test. No. 88-293 (U.S. filed June 5, 1989).

In reversing a jury verdict for plaintiff, the court of appeals found in the alternative that plaintiff's common law copyright law claim was (1) barred under a two-year state statute of limitations; or, (2) if not governed by state law, was preempted by the 1976 Copyright Act, the cause of action having arisen after January 1, 1978.

May v. Watt, 822 F.2d 896 (9th Cir, 1987). Plaintiff, a designer of homes, entered into the contract with defendant, a developer, to design a residential condominium complex. Plaintiff had a provision inserted into the contract to the effect that no design changes in the plans, drawings, or specifications could be made without his permission. During the construction of the project, plaintiff complained that the condominium's appearance did not accurately reflect the plans. Dissatisfied with defendant's response, he sued for copyright infringement, a Lanham Act Section 43(a) violation, breach of contract, fraud, and "tortious breach of contract."

At trial, the court entered a directed verdict for defendant on all claims except breach of contract. The jury subsequently found defendant breached the contract by failing to construct the physical buildings in conformity with plaintiff's designs and specifications.

Given that the relief plaintiff received was as great or greater than he would have received under the copyright and Section 43(a) claims, the court of appeals found no reason to reach the question whether plaintiff properly stated a cause of action under those two claims.

TENTH CIRCUIT

De Gette v. The Mine Company Restaurant, 751 F.2d 1143 (10th Cir. 1985), like Mention v. Gessell in the Ninth Circuit supra, raised a statute of limitations problem for a common law infringement claim over architectural drawings. Reversing the district court, the court of appeals found that the limitations period did not run until plaintiff discovered or should have discovered the infringement.

ELEVENTH CIRCUIT

Donald Frederick Evans & Associates, Inc. v. Continental Homes, Inc., 785 F.2d 897 (11th Cir. 1986), principally involved forfeiture of protection for residential housing plans due to failure to affix notice to copies of the plans published as advertisements in a newspaper over a five year period. Of interest to this study is the following footnote:

> The district court also included in its list of publications without notice the fact that the Baywood model home was exhibited to the general public without any copyright sign displayed. We do not include this in our calculation of the number of copies published without notice, however.
>
> Public display of a model home must be distinguished from publication of architectural drawings when analyzing the protection afforded by the Copyright Act to the owner of a copyright in the architectural drawings. The copyright owner is vested with certain exclusive rights in the drawings as listed in 17 U.S.C. §106, including reproduction of, and preparation of derivative works therefrom "so as to instruct a would-be builder on how to proceed to construct the dwelling pictured."

> Imperial Homes Corp. v. Lamont, 458 F.2d 895, 899 (5th Cir.1972). The copyrighted drawings do not, however, "clothe their author with the exclusive right to reproduce the dwelling pictured." Id.; see also Herman Frankel Org. v. Tegman, 367 F. Supp. 1051 (E.D.Mich 1973). The building itself has "an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information," 17 U.S.C. §101, and as such is an useful article not susceptible to copyright. See Baker v. Selden, 101 U.S. 99, 25 L.Ed. 841 (1880); 1 M. Nimmer, Nimmer on Copyright §2.08[D] at 2-108-2 (1985)... A builder who constructs a home substantially similar to a dwelling already constructed is not liable for copyright infringement merely based on the substantial similarity if he or she did not engage in unauthorized copying or use of the copyrighted architectural drawings. See 17 U.S.C. §113(b). In light of this distinction, we do not consider the public display of a model home to constitute a publication of the architectural drawings from which it was constructed. Cf. Imperial Homes Corp., 458 F.2d at 899; DeSilva Constr. Corp. v. Herrald, 213 F.Supp. 184, 195-98 (M.D.Fla.1962).[86]

Cardinal Industries, Inc. v. Anderson Parrish Associates, CCH COPR. L. REP. Para. 25,946 (MD Fla. 1986), aff'd without opn., 811 F.2d 69 (11th Cir.), cert. denied, 108 S. Ct. 88 (1987). This case of infringement of plans for modular student housing was decided on the ground that there was no substantially similarity between defendant's and plaintiff's plans. In dictum, however, the court wrote: "the existence of such plans does not prevent the building of a similar structure as taught by the copyrighted plans."[87]

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[86] 785 F.2d at 901 n.7

[87] CCH COPR. L. REP. Para. 25,946, at p. 29, 329.

best copy available

Arthur Rutenberg Corp. v. Dawney, 647 F. Supp. 1214 (MD Fla. 1986) is the rare case where the architect's brochure in which the infringed plans were reproduced contained a proper copyright notice. This notice nevertheless featured in the case, since, when defendant couple showed the brochure to a builder and asked him to prepare substantially similar plans, he refused due to the existence of the notice, whereupon defendants went to another draftsman who apparently had no such reservations. As drafted, defendants' plans were substantially similar to plaintiff's. A house was then constructed based on these second plans. Infringement was easily found (as was defendants' vicarious liability) and damages of $134,750.17 plus $11, 000 in attorneys' fees and costs were awarded. The damage figure was based on the difference between the cost of the house ($200,000) and its subsequent resale ($334,750.17).

DISTRICT OF COLUMBIA CIRCUIT

Auerbach v. Sverdrup Corp., 829 F.2d 175 (D.C. Cir. 1987), cert. denied, 108 S Ct. 1075 (1988), involved plans for a parking garage at Union Station, Washington, D.C., and raised only one issue: Whether the United States had given its authorization or consent to copyright infringement of the plans. If it did, under 28 U.S.C. §1498(b), plaintiff's sole remedy for infringement was for reasonable compensation in the Court of Claims. In reversing the trial court, which had found that such authorization or consent had been given, the court of appeals held there was no evidence the government even knew of plaintiff's plans, muchless wanted them copied.[88]

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[88] 829 F.2d at 181.

III. OTHER FORMS OF PROTECTION

Copyright is not the only form of legal protection used by architects; it is not even the most common. Contractual arrangements, especially those using standard American Institute of Architects contracts, represent the most frequently relied upon form of protection. Comments submitted for this report indicated, however, that contractual protection suffers from a substantial deficiency: it is limited to those in privity. Since a large number of disputes arise between architects and those not in privity, architects whose rights have been violated are forced to rely on other forms of protection. In addition to copyright, other federal forms of protection include design patents and the Lanham Act; other forms of state protection include trademark, trade dress, unjust enrichment, misappropriation, unfair competition, conversion, and tortious interference with contractual relations.

Because we have generally noted the courts' treatment of nonpatent forms of protection in Parts I and II, we shall only briefly review them here. We begin, however, with a discussion of design patents.

Federal Forms of Protection

1. Design Patents

Design patents have been issued for structures or components thereof. Four such patents, submitted by one of the commentators to our Notice of Inquiry, are reproduced in the Appendix. Two of these, Nos. 254,030 and 264,250, state claims for the "ornamental design" of the structure. Earlier decisions have upheld copyright in certain architectural components.[89]

Generally, patentable designs must embody a "new, original and ornamental design for an article of manufacture,"[90] and must meet the requirements of novelty, originality, and nonobviousness. In its submission, the Frank Lloyd Wright Foundation stated:

> By far the biggest obstacle to design protection is the requirement that the design be nonobvious.... This is manifested primarily in the assessment of what is pertinent art and who is the ordinary designer with skill in the pertinent art. Thus, the statutory prerequisite of nonobviousness is a very difficult standard to overcome in our context.
>
> In sum, these statutory requisites, when combined with the high cost and long delay that is associated with obtaining a design patent, makes the design patent law unworkable and impractical in protecting works of architecture and works related to architecture.[91]

Additionally, the relatively short design patent term -- 14 years -- may be inadequate.[92]

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[89] See Riter-Conley Mfg. Co. v. Aiken, 203 F. 699 (3d Cir. 1913); Ex Parte Foshay, 7 U.S.P.Q. 121 (Pat. Off. Bd. App. 1930).

[90] 35 U.S.C. §171 (1982). See also U.S. Patent and Trademark Office Manual of Patent Examining Procedure §1502 (4th Rev. ed. 1982) for an interpretation of this section.

[91] Comment #11 at 15.

[92] 37 CFR 202.10(a) & (b) currently state that "a copyright claim in a patented design or in the drawings or photographs in a patent application will not be registered after the patent has issued;" "[w]here the patent has been issued, however, the claim to copyright in the drawing will be denied copyright registration."

2. The Lanham Act

The Lanham Act [93] has at least two provisions relevant to our study; first, the definitions of "trademark" and "service mark" in Section 45 may be read to include certain architectural structures or components thereof. Second, Section 43(a)'s broad unfair competition coverage may include attempts to "palm off" another's architectural authorship as one's own.

The Lanham Act protects symbols of origin (including designs) used to identify and distinguish products or services. The courts have held that "[i[n a proper case, a uniquely designed building can serve as a service mark." [94] Such "proper cases" typically involve configurations of shapes and colors, used in conjunction with the name or logo of the company offering the service so as to establish a link in the consumer's mind between the service (e.g., Fotomat) and the structure. While the architect may create the design of the structure, he or she does not use it; rather, it is the architect's client who uses the design in connection with the client's business; thus, the design is likely to be associated with the client, not the architect, with service (or trademark) rights vesting in the client, not the architect.

Accordingly, for the trademark or service mark to vest in the architect, the product (the structure) must be associated with the architect, a situation most likely to occur in the architect's design of unique structures. However, significant obstacles exist for architects who create one of a kind buildings or distinctive architecturally related designs. As noted by the Frank Lloyd Wright Foundation, first the architect must prove that the design is a "good" within the meaning of the statute. [95] Then, for federal protection, the architect must show that the trademark has been used in interstate commerce, an impossibility, generally, for one of a kind structures, or indeed, perhaps for any structures besides mobile homes.[96] Other obstacles to protection exist, including the doctrine of functionality and the requirement of secondary meaning. In Demetriades v. Kaufman, 680 F. Supp. 667, 669-670 (S.D.N.Y. 1988), the court stated with respect to this latter obstacle:

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[93] 15 U.S.C. §1051 et seq.

[94] Fotomat Corp. v. Cocharan, 437 F. Supp. 1231, 1241 (D. Kan. 1977); Fotomat Corp. v. Houck, 166 USPQ 271 (Fla. Cir. Ct. 1970). Cf. Fotomat Corp. v. Photo Drive-Thru, Inc., 425 F. Supp. 693 (DNJ 1977).

> We are referred to no case extending section 43(a) protection to residential development....
>
> ...
>
> [W]e believe that extending section 43(a) protection to individual, residential designs would work a profound mischief in both the law and the home building industry.

The court also chastized the architect for claiming "in one breath" that the house was a unique, one of a kind work, and then arguing that the design of the house had acquired secondary meaning in the marketplace. [97] Because most works of architecture (including the one at issue in Demetriades) are not inherently distinctive, consumers are unlikely to be confused as to source by a third party's unauthorized reproduction of the architect's work. The Lanham Act, as a consumer oriented statute, is not believed, therefore, to provide the type of protection most needed by architects: protection against copying.

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[95] See 15 U.S.C. §1127; In re US Home Corp. of Texas, 201 USPQ 602 (TTAB 1978).

[96] See Frank Lloyd Wright Foundation Comment at p. 20 n.8.

[97] 680 F. Supp. at 668. In the court's third opinion, it granted the architect permission to amend his complaint to plead a trademark claim for his name after failing to prevail on a trade dress claim. 1988 U.S. Dist. LEXIS 8634 (S.D.N.Y. Aug. 3, 1988).

State Forms of Protection

1. Trademark

With the exception of the interstate commerce requirement, the analysis of trademark protection under the Lanham Act applies equally to state trademark protection, and hence will not be repeated here.

2. Contract, tortious interference with contractual relations

We noted above that contract law is the most common form of protection relied upon by architects, but that it has a substantial drawback: it is limited to those in privity. On occasion, however, the courts have sustained claims against third parties for tortious interference with contractual relations.[98] These occasions involve special facts and can not, therefore, form the basis for a rule of general applicability.

3. Conversion, unjust enrichment, misappropriation, unfair competition

State efforts to protect designs must be viewed against the doctrine of constitutional preemption and preemption under the Copyright Act. Section 301 of the Copyright Act preempts any state causes of action with respect to subject matter within that specified by Sections 102 and 103, for activities that violate legal or equitable rights equivalent to any of the exclusive rights within the general scope of copyright as specified by Section 106.

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[98] Compare Gemcraft Homes Inc. v. Sumurdy, 688 F. Supp. 289 (ED Tex. 1988) with McNabb Bennett & Associates, Inc. v. Terp Meyers Architects, 1987 U.S. Dist. LEXIS 1787 (N.D. Ill. March 10, 1987).

Each case must be decided on its own facts, since it is not the mere appellation of "conversion," "unfair competition," or "misappropriation,"[99] or "unjust enrichment" that determines whether the rights are equivalent; instead, it is the nature of the claim pleaded by the plaintiff and the elements required to prove that claim that are determinative. A crude rule of thumb is to ask whether the activity is merely "copying by another name," or, whether additional elements of proof, ones that qualitatively change the nature of the claim from that of copyright infringement are required. These determinations are not peculiar to works of architecture, and thus pose no greater or lesser difficulty for such works. A number of the decisions reviewed above have, in fact, sustained claims for conversion and unjust enrichment.

The Supreme Court has recently addressed the general constitutional preemption doctrine in a case involving a boat hull design, Bonito Boats, Inc. v. Thunder Craft Boats, Inc.[100] The Court noted that while its earlier decisions in Sears-Compco indicated an "implicit recognition that all state recognition of potentially patentable but unpatented subject matter is not ipso-facto pre-empted by the federal patent laws," still:

> State law protection for techniques and designs whose disclosure has already been induced by market rewards may conflict with the very purpose of the patent law by

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[99] In Demetriades v. Kaufman III, 690 F.Supp. 289 (S.D.N.Y. 1988), the court found plaintiff stated a valid cause of action for misappropriation of the interior of a custom home.

[100] 57 U.S.L.W. 4205, No. 87-1346 (Feb. 21, 1989).

> decreasing the range of ideas available as the building blocks of further innovation.[101]

The Court made clear that preemption of state law applied not only to works that were patentable, but, as importantly, to works that did not meet the standards for patent protection: "To a limited extent, the federal patent laws must determine not only what is protected, but also what is free for all to use."[102] Given the difficulties that works of architecture have in qualifying for patent protection, Bonito Boats may spell difficulties for state law design protection.

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[101] Id., slip opn. at 9. See also Aronson v. Quick Point Pencil Co., 440 U.S. 257, 262 (1979)("[T]he stringent requirements for patent protection seek to ensure that ideas in the public domain remain there for the use of the public"). The Bonito Boats Court also made clear that trade secret law was not preempted. Id., slip opn. at 12. See also Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974).

[102] Bonito Boats, 57 U.S.L.W. 4205.

CHAPTER 4: LEGISLATIVE HISTORY OF PROTECTION UNDER U.S. LAW OF WORKS OF ARCHITECTURE AND WORKS RELATIVE TO ARCHITECTURE

The Early Statutes

From our nation's inception, copyright law has been extended to both traditional belle lettres and works of a scientific or technical nature. The pre-constitution statutes of three colonies, Connecticut,[1] North Carolina, [2] and Georgia [3] protected maps, as did the first Copyright Act of 1790, which added the further category of charts. [4]

In 1870, the Copyright Act was amended to include within the class of protectible subject matter "models or designs intended to perfected as works of the fine arts." Copyright owners of such works were given the exclusive right to "complete, copy, execute, finish, and vend the work." [5]

That "works of fine arts" was to be construed broadly is seen from the Amendatory Act of 1882, which provided:

> Manufactures of designs for molded decorative articles, tiles, plaques, or articles of pottery or metal subject to

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[1] Act of 1783, reproduced in COPYRIGHT ENACTMENTS: LAW PASSED IN THE UNITED STATES SINCE 1783 RELATING TO COPYRIGHT at 2 (Copyright Office Bulletin No. 3, Revised) (1973).

[2] Id. at 15.

[3] Id. at 17.

[4] Id. at 22, Act of May 31, 1790, 1 Stat. 124-126, Sec. 1, 1st Cong., 2d Sess.

[5] Id. at 36, Act of July 8, 1870, 16 Stat. 212-217, Sec. 86, 41st Cong., 2d Sess.

> copyright may put the copyright mark prescribed by section forty-nine hundred and sixty-two of the Revised Statutes, and acts additional thereto, upon the back or bottom of such articles, or in such other place upon them as it has heretofore been usual for manufactures of such articles to employ for the placing of manufacturers, merchants, and trade marks thereon. [6]

The Copyright Revision of 1909

Beginning in 1905, efforts began to revise and consolidate the various Copyright Acts. At the request of Senator Kittredge, Chairman of the Senate Committee on Patents, the Copyright Office established revision conferences, comprised of a series of meetings held at the Library of Congress with representatives of parties affected by revision legislation, in order as much as possible, to reach consensus on the specifics of the legislation.

The first reference to works of architecture or works related to architecture occurred at the May 31, 1905 meeting, in which a delegate of the Architectural League of America expressed "great interest[] in what work can be done by this conference along the line of protecting the design of architects in the matter of being reproduced or executed more than once, as well as being copied directly ... ." [7]

The first draft bill, dated October 23, 1905, would have protected the following subject matter in class 1:

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[6] Id. at 49, Act of August 1, 1882, 22 Stat. 181, 47th Cong., 1st Sess.

[7] 1 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT, Part C at 33 (Brylawski and Goldman eds. 1976).

> Class 1, — Original works of the fine arts, comprising:
>
> (a) Drawings (including the plans, sketches, and designs of architects; and such drawings, of a scientific or technical character, as may not be regarded as works of art, considering the purpose they are mainly intended to serve).
> (b) Paintings.
> (c) Etchings.
> (d) Statues, statuary, sculpture.
> (e) Models or designs intended to be perfected as works of the fine arts.[8]

The next reference to architectural works came during a March 13, 1906 meeting at the Copyright Office, when The American Institute of Architects proposed that works of architecture be included in the revision act:

> MR. BROWN [AIA]: ... [T]here is only one point that our society had raised, and that was that in the classes of the fine arts it appears proper that works of architecture should be protected further than as mere drawings. Architecture as shown in the completed works should be classed with sculpture and painting. Therefore there should be inserted some such phrase as "completed works of architecture." ...
>
> MR. PUTNAM: (The Librarian of Congress). You would insert ... the particular phrase "paintings, etchings, statues, statuary, sculpture, and architecture as shown in the completed work."
>
> MR. BROWN: We simply inserted architecture in there with sculpture. It was very doubtful whether it would convey the idea.

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[8] 2 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT, at XXVII-XXVIII (Brylawski and Goldman eds. 1976).

> MR. PUTNAM: That is the only suggestion of the architects?
>
> MR. BROWN: That is the only suggestion.[9]

This suggestion was then questioned by the book publishers who wondered whether it "would not hamper unduly the publication in books, or separately, of photographs of buildings, public buildings, possibly."[10]

On March 14, 1906 the following colloquy took place:

> MR. STEUART (ABA): There is one more clause which might be left out. I agree entirely with the principle of the suggestion, but I think that just one clause might be left out, and that is the matter included in the parenthesis of section 7:
>
> > "including drawings of a scientific or technical character, and the plans, sketches and designs of architects".
>
> They are of a scientific or technical nature, and no matter how valuable they may be, the work certainly ought to be protected, but yet it would be quite impossible to call them artistic.
>
> MR. AMES (Int'l Typographers Union): Should not they be protected under some other clause?
>
> MR. STEUART: I think so, and therefore I should favor the retention of those words; and also the words "plans, sketches and designs of architects" should be included.
>
> MR. FULLER (Assoc. of Bar of NY): But the works of architects may be works of art.
>
> MR. CURTIS (Print Publishers Assoc. of America): They come under the useful things,

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[9] 3 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT, Part E at 11. (Brylawski and Goldman eds. 1976). See also id. Vol. 5, Part M at p.19, item 1(d) (noting the proposals); p.22, item 18.

[10] Id. at 13.

> "maps and other printed or engraved cartographical works, scientific and technical drawings."
>
> MR. STEUART: The question about that is this. They would probably, quite possibly, not be included as works of art unless Congress said so. If the thing was left there for the courts to decide, whether an elaborate drawing of an elaborate piece of machinery, was a work of a high degree of skill and labor, the question as to whether that was a work of art, if that was left to the courts to decide, half a dozen courts would be one way and half-a-dozen more the other way.
>
> MR. FULLER: I think you ought to take it away from section 7, then have only works of art, and put it under section 5, "maps and drawings of a scientific and practical character".

The use of the term "fine arts" was questioned by a representative of the Association of the Bar of the City of New York, who proposed that the term "work of art" be substituted:

> because sometimes a line between the fine arts, decorative arts and industrial arts is difficult to draw; and it should not be drawn. Works of decorative art and the industrial arts are today a most important part of the progress of art, especially in a new country like ours ... .[11]

According to this representative, plans, sketches, and designs of architects would be regarded as works of art.[12]

The next day, March 15, 1906, a draft amended subject matter section was discussed. Subsection 5 would have protected "maps, and drawings of a scientific and technical character." Subsection 7 would have protected "works of art, whether classifiable as useful, decorative, industrial, applied or fine arts." [13]

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[11] Id. at 161.

[12] Id. at 170.

In going over this list, the Librarian of Congress asked the Register of Copyrights why "completed works of architecture" were not included. [14] Instead of the Register answering, a question was asked by a member of the conference.

> MR. GEORGE HAVEN PUTNAM (American Publishers' Copyright League): I want to make an inquiry about that. Would the protection given to the work of architecture interfere with the production of a reproduction of that work of architecture, if used in a book or magazine? Could a sketch or photograph, taken from a building, not intended for architectural purposes, but as the illustration of a book, be made? The publication of descriptive books, illustrative of cities, is a large industry. Would it be prevented if this specific copyright be given to the work of architecture? Would they be prevented without securing separate arrangement with the architect, from photographing that building, in a guide-book of Washington? I put it as an inquiry.
>
> MR. FULLER: I would answer that. A work of architecture is the putting up of a building, and that the protection of that would prevent anybody from putting up a building like it; but copyright on the completed works would not prevent photographs of the building being taken. Why architecture, why such a building is not included in the term "work of art" I do not see. If a building is not a work of art, it is not because the architect did not consider it to be so.
>
> MR. SOLBERG (Register of Copyrights): The

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[13] _Id_. at 179.

[14] _Id_. and _id_. at 183.

> phraseology proposed is "architecture as shown in a completed work." [15]

No follow-up discussion occurred. On a May 31, 1906, the first revision bill was introduced. It did not contain a provision extending protection to works of architecture, but no explanation was given for the omission.

Joint Hearings of the Senate and House Committees on Patents were held in 1906. Although invited to participate, the American Institute of Architects did not appear. In a memorandum submitted by the Library of Congress, the Library noted:

> The term "works of art" is deliberately intended as a broader specification then "works of the fine arts" in the present statue, with the idea that there is subject matter (e.g., of applied design, yet not within the province of design patents) which may properly be entitled to protection under the copyright law. [16]

The legislative reports do not mention works of architecture.

The 1909 Act and Copyright Office Regulations Thereunder

As passed, the 1909 Copyright Act provided in Section 5(g) for "works of art, models, or designs for work of art." Section 5(i) protected "drawings or plastic works of a scientific or technical character."

The basic premise of the Office's practices immediately following passage of the 1909 Act was that "[P]roductions of the industrial arts utilitarian in purpose and character are not subject to copyright registration, even if artistically made or ornamented."[17] Compendium I of Copyright Office Practices under the 1909 Act, issued in 1970 and revised in 1973, contained a number of references to works in Classes G and I:

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[15] 3 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT, Part E at 183 (Brylawski and Goldman eds. 1976).

[16] 4 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT, Wed. June 6, 1906 at 8 (Brylawski and Goldman eds. 1976).

> In general
>
> No precise definition of a work of art can be given. In broad terms, a work of art is an original pictorial, graphic, or plastic work designed to display a pattern or shape for the sake of its aesthetic appeal to the eye, as distinguished from one designed to convey factual information or to fulfill a useful function.[18]
>
> Works of Pure Art
>
> . . .
>
> b. The registrability of a work of art is not affected by the following factors:
>
>   1. The intention of the author as to the use of the work. (For example, registrability would not be affected by the fact that (1) a drawing is to be used as a design for automobiles, or (2) a painting is to be used as decoration on tea trays, or (3) a statuette is to be used as a base for lamps).
>
>   2. The number of copies reproduced.
>
>   3. The availability of protection under the design patent law.
>
> c. The fact that a work of art has as its subject an article of utility, or is the design or model for an article of utility, will not preclude its registration in Class G. However, if there is

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[17] COPYRIGHT OFFICE BULLETIN NO. 15 (1910).

[18] No. 8 at 5-11.

some indication that the applicant is seeking protection for the article of utility portrayed, we will write a cautionary letter.

Examples:

(1) A drawing of an automobile body.
(2) A painting of a dress design.
(3) A hand-carved ship model.

Works of Art Embodied in Useful Articles.

a. The fact that a two-dimensional work of art appears as surface ornamentation on an article of utility will not preclude registration for the work of art as such apart from the article of utility.

Examples:

(1) A painting on a dinner plate.
(2) An etching on a tray.
(3) A portrait printed on a cigar box.
(4) A floral design on a kitchen chair.
(5) A printed picture of Roy Rogers on a child's brush and comb set.
(6) An artistic print on wrapping paper or on paper bag.

b. The fact a three-dimensional work of art is used in combination with other material to make a useful article will not preclude registration for the work of art as such apart from its use in such article.

Examples:

(1) A sculptured figure used as the handle of a letter opener.
(2) A statuette used as a lamp base.
(3) Artistic scroll work framed as a fire screen.
(4) A sculptured figure mounted on a base containing an ash tray.

Attractively Shaped Articles of Utility.

a. When the shape of an article is dictated by, or is necessarily responsive to, the requirements of its utilitarian function, its shape, though unique and attractive, cannot qualify it as a work of art.

   Examples:

   (1) Machinery such as generators or lathes.
   (2) Tools such as saws or hammers.
   (3) Instruments such as hypodermic needles, scalpels, calipers, or hair clippers.

b. When the sole intrinsic function of an article is its utility, the fact that it is uniquely and attractively shaped will not qualify it as a work of art (but seem item V below). In appropriate cases of this kind we may suggest that the applicant write to the Patent Office for design patent information.

   Examples:

   (1) Automobiles.
   (2) Machines such as cement mixers, air conditioners, or washing machines.
   (3) Household equipment such as bathtubs, sinks, refrigerators, pots, and pans.
   (4) Furniture.
   (5) Wearing apparel.

Works of Art that are also Articles of Utility.

a. When an object is clearly a work of art in itself, the fact that it is also a useful article will not preclude its registration.

   Examples:

   (1) A stained-glass window.
   (2) A bas relief door.
   (3) Sculptured figures usable as book ends.

(4) A sculptured figure with a slot for use of a bank.
(5) A mortuary urn.
(6) An artistic vase or bowl.
(7) Artistic jewelry.

b. In very rare cases an article of utility that will not ordinarily be considered a work of art may be so artistically shaped that, when its utility is ignored or exhausted, it is intrinsically valuable as an object of display for its aesthetic appeal to the eye. In such very rare instances the article may be acceptable as a work of art.

Examples:

(1) Bottles.
(2) Drinking glasses.
(3) Dishes.
(4) Picture frames. [19]

Revision Bills from 1913 to 1940

Design Bills

Shortly after passage of the 1909 Act, a concerted effort was made to enact design legislation, an effort that continues today. None of the dozens of design bills have expressly included works of architecture. However, during one such early effort in 1916, Representative Nolan, in cross-examining a witness, indicated that in his view such works were covered by the design bills, [20] a position that may be generally applied to all of the numerous subsequent efforts.

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[19] Id. at S-11 to S-15.

[20] Registration of Designs: Hearing on H.R. 6458 and H.R. 13618, Before the House Committee on Patents, House of Representative, 64th Cong., 1st Sess. 68 (1916). See also id. at 70 (Representative Watson inquires whether a design in a house could be copyrighted).

Early Efforts to Adhere to the Berne Convention

Beginning in the 1920s, efforts were made to revise U.S. copyright law to permit adherence to the Berne Convention. As discussed in detail in Chapter 5, the Berne Convention has, since 1908, provided protection for works of architecture (in addition to works related to architecture). It was natural, therefore, that the question of protection for works of architecture would be raised in these bills.

H.R. 11476, [21] introduced by Representative Tincher on April 28, 1923, would have simply extended the "rights and remedies" granted under the 1909 Act to "authors of works of architecture" under a new Class 5(n). This identical approach was taken by Representative Tincher in H.R. 14035 [22] and by Representative Davis of Tennessee in H.R. 13676. [23]

A more detailed approach was taken by Representative Dallinger the following Congress in H.R. 9137. [24] Because the provisions of H.R. 9137 on works of architecture bear a striking resemblance to those originally proposed in the recent successful effort to adhere the Berne Convention in the 100th Congress, we summarize them here:

> Sec. 68. A definition of "work of architecture" was given as: "any building or structure having an artistic character or design, in respect of such character or design, or any model for such building or structure, provided that the protection afforded by this Act shall be confined to the artistic character and

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[21] Sec. 3, H.R. 11476, 67th Cong. 2d Sess. (1923).

[22] H.R. 10435, 67th Cong., 4th Sess. (1923).

[23] H.R. 13676, 67th Cong., 4th Sess. (1923).

[24] 68th Cong., 1st Sess. (1924).

> design, and shall not extend to processes or methods of construction."
>
> Sec. 15. A new Class 5(n) would have been provided, protecting "works of architecture, models, and design for architectural works."
>
> Sec. 26(b). Copyright owners of works of architecture would not be entitled to an injunction restraining the construction of an infringing building if the building had been substantially begun, nor would there be seizure or demolition of infringing buildings.
>
> Sec. 27. The making or publishing of paintings, drawings, engravings, or photographs would not be an infringement of copyright in a work of architecture.

In the 68th, 69th, 71st, and 72d Congresses, substantially similar provisions were included in Berne adherence bills. [25]

In 1925, hearings were held on one of the Berne bills, H.R. 11258; however, the sole reference to works of architecture was in passing, as Register of Copyrights Thorvald Solberg noted the Berne Convention required the grant of protection for such works. [26]

The 1908 Berlin text of Berne remained open for adherence until August 31, 1931, and on January 13, 1931, H.R. 12459, legislation introduced by Representative Vestal that contained protection for works of architecture, passed the House. Eight days later, on January 21, 1931, President Hoover transmitted the Berne treaty to the Senate for ratification, but Congress adjourned before the Senate acted either on the treaty or H.R. 12459. Although hearings were held in the House on H.R. 12459, the topic of works of architecture was not discussed.

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[25] See H.R. 11258, 68th Cong., 2d Sess. (1925) (Perkins); H.R. 10434, 69th Cong., 1st Sess. (1926) (Vestal), H.R. 6990, 71st Cong., 2d Sess. (1929) (Vestal); H.R. 12549, 71st Cong. 2d Sess. (1930) (Vestal); H.R. 139, 72d Cong., 1st Sess. (1931) (Vestal); S.176, 72d Cong., 1st Sess. (1931) (Herbert); S. 1035, 72d Cong., 1st Sess. (1931) (Tydings); S.3895, 72d Cong., 1st Sess. (1932) (Dill). See also general revision bills introduced by Rep. Sirovich which would have provided protection for "works of art; and models or designs for architectural works:" H.R. 10364, 72d Cong., 1st Sess. (1932) and identical or similar provisions in H.R. 10740, 72d Cong., 1st Sess. (1932); H.R. 10976, 72d Cong. 1st Sess. (1932); H.R. 11948, 72d Cong., 1st Sess. (1932); H.R. 12094, 72d Cong., 1st Sess. (1932); H.R. 12425, 72d Cong., 1st Sess (1932); H.R. 11374, 74th Cong. 2d Sess. (1936).

[26] Copyright: Hearings on H.R. 11258 before the Committee on Patents, House of Representatives, 68th Cong., 2d Sess. 16 (1925).

During the 73d, 74th, 75th, 76th and 77th Congresses, new Berne adherence bills were introduced, which also would have protected works of architecture.[27] Despite extensive hearings, no witnesses on behalf of architectural interests appeared, nor does there appear to have been any reference to the issue in the numerous committee reports.

Suspension of Efforts to Join the Berne Convention and Creation of the Universal Copyright Convention

Although one Berne revision bill was passed by the House in 1931, and another (but different) one passed the Senate in 1935, efforts to adhere to the Berne Convention were abandoned in 1940, not to be resumed until 1986. After World War II, the United States participated in the development of a new convention in lieu of Berne -- the Universal Copyright Convention, one that permitted retention of most of the existing provisions of U.S. law.[28] The United States became a party to the UCC when the Convention came into force in 1955.

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[27] See H.R. 5853, 73d Cong., 1st Sess. (1933) (Luce); H.R. 8557, 74th Cong., 1st Sess. (1935) (Bloom); H.R. 10632, 74th Cong., 2d Sess. (1936) (Daly); S.1928, 73d Cong., 1st Sess. (1933) (Cutting); S.2465, 74th Cong., (1935) (Duffy); S.3047, 76th Cong., 1st Sess. (1935) (Duffy); S.3047, 76th Cong., 3d Sess. (1940) (Thomas).

[28] The Copyright Act was amended in relatively minor ways. See P.L. No. 743, 61 Stat. 655, 83d Cong., 2d Sess. (1955).

During the drafting conferences that led to the formulation of the UCC, the delegations of Denmark, Finland, Germany, Sweden, and Switzerland proposed that "architectural works" be a protected subject matter class. This proposal met with opposition from a private sector attorney member of the United States delegation on the extraordinary ground that the Constitution allegedly forbade it.[29] No support for this assertion was given nor has it ever been heard again.

The Report of Sir John Blake, Rapporteur General for the Convention, noted the suggestion that "works of architecture" be protected as well as the U.S. attorney's opposition thereto.[30] Given the opposition, which one commentator has characterized as based less on the stipulated grounds than upon a general animadversion to such protection[33] the proposal was not incorporated in the UCC, which instead, in Article I, leaves it up to each nation to specify the works which are to be considered "literary, scientific, and artistic works" -- including works of architecture.

Omnibus Revision of the 1909 Copyright Act

A. The Strauss Study

The movement for a general revision of the 1909 Copyright Act was revived in 1955, when Congress provided funds for a comprehensive program of research and studies by the Copyright Office into issues that might need to be addressed in an omnibus revision. Funds were subsequently provided in 1956 and 1957 for further research and study. Eventually, thirty-five studies were written and then printed by the Senate Subcommittee on Patents, Trademarks and Copyrights.

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[29] Records of the Intergovernmental Copyright Conference, Geneva at 32 (1952).

[30] Records of the Intergovernmental Copyright Conference, Geneva at 7-8 (1952).

[33] Hellmuth, Obsolescence Ab Initio: The New Act and Architectural Copyright, 22 Bull. Copr. Soc'y 169 (1975).

Study No. 27, Copyright in Architectural Works, by William S. Strauss is a valuable thirteen page review. Strauss began by noting "the problem:"

> Architecture has traditionally been considered one of the arts, and the copyright laws of most countries provide specifically for copyright protection of "artistic works of architecture" (i.e., artistic architectural structures) as well as of plans, drawings, or models for architectural structures. In the United States, as will be seen, the protection now afforded to architectural works, particularly as regards "artistic" structures, is somewhat uncertain and may be deemed too narrow. The problem to be considered here is that of the provisions that might be appropriate in a new copyright law for the protection of such works.[34]

In reviewing that protection, Strauss was careful to note the distinction between the plans, drawings, or models of an architectural structure, and, the structure itself:

> In considering the problem of copyright protection, this distinction between the plans and the structure must be kept in mind. Thus, as regards copying, plans may be reproduced in the form of plans or their features may be reproduced in the form of a structure; and a structure may be reproduced in another structure with or without the use of the plans.[35]

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[34] COPYRIGHT OFFICE STUDY NO. 27, Strauss, Copyright in Architectural Works (1959). Senate Committee Print, 86th Cong., 2d Sess., 1966 Copyright Law Revision Study at 67. [Hereinafter Strauss Study].

[35] Id.

Strauss then reviewed the then current protection for the broad class of "architectural works" concluding that "the common law would protect such unpublished plans against unauthorized reproduction in the form of plans and perhaps in the form of a structure." [36] He noted, however, that "the few reported cases on the question of what constitutes publication of architectural plans as will terminate common law property rights would seriously limit the practical protection afforded by the common law.[37] [I]f, as [some] cases hold, the structure were treated as a published work, the common law would not afford any literary property right in the structure itself." [38] Thus, protection for the structure would be available only under the federal statute -- the 1909 Copyright Act.

In reviewing protection under the 1909 Act, Strauss discussed the practice of the Copyright Office in routinely registering architectural plans under Section 5(i) of the Act, but added "[w]hether the copyright in plans protects them also against unauthorized use in the building of a structure seems highly doubtful," [39] citing Muller v. Triborough Bridge Authority. [40] Muller, however, did not involve a work of architecture, but rather, a bridge approach. Additionally, the court found that the defendant had not even copied plaintiff's plans.

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[36] Id.

[37] Id at 68.

[38] Id.

[39] Id. at 69.

[40] 43 F. Supp. 298 (S.D.N.Y. 1942).

Significantly, Strauss did note that:

> There may be some possibility that in respect to an architectural structure which is itself a "work of art" within the meaning of the statute, the copyright in drawings or models for such a structure will afford protection against their use in building the structure. Section 5(g) of the statute designates "models or designs for works of art" as copyrightable works; and section 1(b) gives the copyright owner of "a model or design for a work of art" the exclusive right "to complete, execute, and finish it."[41]

Strauss believed, however, "In the broad area of architectural structures, those constituting 'works of art' would seem to be relatively rare," adding that "there appears to be no provision in the statute for protection in the far broader area of functional structures which, though attractively designed, do not qualify as 'works of art.'"[42]

After reviewing proposals to include works of architecture as a category of protectible subject matter in the 1923-1940 Berne adherence bills, Strauss turned to international conventions and foreign law, reviewing the laws of the United Kingdom, France, Germany, Mexico, and Argentina.[43]

Strauss' penultimate section was "Analysis of the Issues," in which he again kept distinct protection for plans, etc. and protection for structures. Regarding the plans, he noted that there was no problem with protectibility of plans, but that "[a] question does arise as to whether the building of a structure constitutes publication of the plans." [44] Strauss' preference appears to have been for a legislative clarification that construction of a building did not constitute publication of the plans it was based upon. [45]

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[41] Id. n. 35 at 70. In support of this proposition, Strauss cited, among other cases, Jones Bros. Co. v. Underkoffler, 16 F.Supp. 729 (M.D. Pa. 1936), which held that a cemetery monument, registered as a work of art, was infringed by the unauthorized use of the design in the construction of another monument.

[42] Id. at 71.

[43] Id. at 72-74.

Regarding works of architecture, Strauss stated:

> Copyrighted plans are apparently not protected against their use in the building of a structure, at least as far as the functional ideas or the processes or methods of construction are concerned. It may be that in relatively rare cases where a planned structure would qualify as "work of art," copyright in the plans (as a "model or design for a works of art") would protect the plans against their use in building the structure.
>
> Where no artistic features are present, the courts have been inclined to the view that the use of plans in the building of a structure is merely the use of the ideas, processes, or methods disclosed in the plans. [46]

The difficult question, as Strauss recognized, was in determining what constitutes, as he called it, an "artistic architectural structure." He also noted that this problem was "apparently the same ... as the familiar and troublesome question of what constitutes a 'work of art' in other areas of three-dimensional objects that may be utilitarian or aesthetic or both in combination." [47]

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[44] _Id_. at 75.

[45] _Id_.

[46] _Id_. at 75-76.

[47] _Id_. at 77.

Like the definition of "work of art," the concept of "artistic structures" was believed to "elude[] precise definition." [48]

Strauss, however, offered the following "broad delineations:"

> Some broad delineations, however, can be suggested. The ordinary structure designed for functional use (such as dwellings, shops, office buildings, factories, etc.) though attractive of its kind, would rarely, if ever, qualify as a "work of art." A monumental structure which is to be enjoyed, not in any functional use, but in the contemplation of its aesthetic form and the evocation of feeling, may readily qualify. Between, these two extremes is a range of structures (of which some churches, museums, or auditoriums may be examples) which have both functional use and artistic form in varying degrees. It is in this last category that the dividing line between the primarily utilitarian and the primarily artistic (with the other being present to some extent) becomes shadowy, sometimes leaving much to subjective judgment as to whether a particular structure is or is not a work of art.
>
> It has been suggested that the long-term protection of the copyright statute should be extended only to architectural structures that are solely artistic in character with no functional utility; or at most, to those that are primarily artistic though having some utilitarian aspects. If this view is adopted, perhaps some other form of protection for a relatively short term would be appropriate for the features of artistic embellishment incorporated in a primarily utilitarian structure. Such protection might be given, for example, under general legislation like that recently proposed for the protection of "ornamental designs of useful articles." [49]

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[48] Id.

[49] Id. at 77.

Regarding publication of such structures, Strauss leaned toward the view that construction and "display" in a place generally accessible should not constitute publication. [50] Unauthorized reproduction in two-dimensional form by photographs and in motion pictures and on television was generally permitted in foreign laws, Strauss indicated. [51] He also noted "it seems unlikely that the courts, in whose discretion ... remedies lie, would enjoin the completion of an architectural structure or order its demolition." [52]

Four individuals commented on the Strauss study: John Schulman, Joshua Cahn, Melville B. Nimmer, and Samuel W. Tannenbaum. Mr. Schulman preferred that protection for works of architecture be accomplished under design legislation, but wished it made clear in the copyright revision legislation that construction of the building or filing of the plans thereto with a permit authority did not constitute publication of the plans. Mr. Cahn's was the most extensive comment:

> Dwellings, shops, office buildings, and factories are more and more conceived of and executed as works of art and too often churches, museums, and auditoriums are erected which are without artistic value. The unexpressed notion appears to be that if a considerable portion of the cost of the building has been for decoration, it may be considered a work of art, whereas, if form has followed function, the building is not a work of art. This is a dangerous notion and one which could plunge us into the midst of a bitter artistic controversy. [53]

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[50] Id. at 77-78.

[51] Id. at 78.

[52] Id. at 79.

[53] Id. at 85-87.

Ultimately, however, Mr. Cahn argued against prohibiting copying of structures on the ground that the public would benefit more "from the rapid dissemination of architectural innovations than from exclusivity." [54]

Professor Nimmer, on the other hand argued:

> I see no reason why architectural structures in themselves should not likewise be the subject of copyright protection, and here again I think it undesirable to make any arbitrary distinction as "artistic" structures. If the form of the structure may be said to be original, this should be sufficient. [55]

Mr. Tannenbaum similarly believed works of architecture should be protected, asking whether a Frank Lloyd Wright dwelling is any less a work of art than the Lincoln Memorial, which, he believed was "almost totally void of utilitarian purpose." [56]

The Register of Copyrights' 1961 Revision Report

In 1961, the Register issued a report as the culmination of the Copyright Office studies. The report, delivered to the Chairman of the House Judiciary Committee, contained tentative recommendations for the omnibus revision. Chapter 2 of the report discussed subject matter of copyright, including architectural drawings and structures:

> a. The present law:
>
> Architectural drawings are copyrightable under the present law within the general category of technical drawings. The copyright in an architectural drawing protects it against the

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[54] Id. at 85.

[55] Id.

[56] Id. at 87.

unauthorized making and distribution of copies of the drawing.

When an architectural structure, such as a monument, is itself a "work of art," copyrighted drawings of the structure are protected against their "execution" by erecting the structure. This is merely an application of the provision in section 1(b) protecting "a model or design for a work of art" against its "execution." But the courts have held that the drawings of a functional structure, which is not a "work of art," are protected against their use in building the structure.

Architectural structures themselves are not mentioned in the present statute. If a structure constitutes a "work of art" (e.g., a piece of sculpture or an artistic monument), the structure itself may now be copyrighted under the general category of "works of art." But copyright protection has been denied to functional structures that do not qualify as "works of art."

b. Protection for the artistic features of functional structures

It seems clear that a structure designed solely for aesthetic effect should be entitled to copyright protection on the same basis as any other nonutilitarian work of art. It seems equally clear, at the other extreme, that a functional structure having no artistic features is not an appropriate subject for copyright protection, even though it embodies original ideas as to technical methods of construction. The more difficult question is whether copyright protection should extend to structures that are functional in purpose but also display non-functional features of "artistic" design.

We believe that what we have said above in regard to the ornamental design of useful articles applies also to the "artistic" design of functional architectural structures. In the case of architecture particularly, it would often be difficult to differentiate between the functional and the "artistic" features of a design. While we are inclined to the view that a limited measure of protection should be afforded to the designs of functional structures, we do not believe that the copyright statute provides the appropriate framework for their protection. We would leave this protection to be dealt with in the separate legislation proposed for the protection of ornamental designs of useful articles.

It should be understood, of course, that a nonutilitarian work of art, such as a piece of sculpture or a mural, which is superimposed upon a functional structure but retains its separate identity, remains copyrightable as a work of art apart from the structure.

Recommendations

(1) The copyright law should continue to protect--(a) Architectural drawings, against the unauthorized making and distribution of copies;
(b) Nonfunctional architectural structures that constitute works of art, on the same basis as sculptural works of art;
(c) Drawings for such a nonfunctional structure, on the same basis as drawings for a sculptural work of art.

(2) The copyright law should not be extended to the design of functional architectural structures. Protection for these designs on a more limited basis should be considered in separate legislation for the protection of ornamental designs of useful articles.

Discussions of the 1961 Report

Following issuance of the report, four meetings of a Panel of Consultants were held to review the recommendations. The first meeting, on September 14, 1961, began with Copyright Office staff explaining the bases for particular recommendations. Then Chief of the Examining Division, Barbara Ringer, explained the recommendations on works of architecture:

> Passing on to the recommendation on architectural drawings and sculptures which, needless to say, is very closely related to this, the recommendations are essentially the same as those for works of applied art. In effect, under the proposals, the protection for architectural drawings, and nonfunctional structures, such as monuments and so forth, would continue under the copyright law as it now exists today. But the report recommends that full copyright protection not be extended to the design of functional structures, and that this type of protection be left to separate design legislation. In other words architectural works would be assimilated to works of applied art.[57]

The first person to comment on the recommendation was Sydney Kaye of BMI:

> I am not certain that you need the specific provision with respect to nonfunctional works of architecture, and I think it may lead to confusion with respect to other nonobjective works of art. I don't see that there is any difference between a structure in which people go to be sheltered, or to enjoy a view, or for other practical purpose and any other type of work of art. Undoubtedly there will be a broad classification for works of art.[58]

The remaining comments came in written submissions. One was from Joshua Cahn, who had responded to the Strauss study, and who essentially reiterated his earlier views.[59] The others commenting, Joseph McDonald,[60] and Samuel Tannenbaum,[61] endorsed the Report's recommendations.

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[57] HOUSE COMMITTEE PRINT. 88th Cong., 1st Sess. Copyright Law Revision, Part 2.

[58] _Id_. at 17-18.

The next reference to architectural works was not made until the January 16, 1963 meeting, at which Sydney Kaye again spoke to the issue:

> [I]t seems to me that a completed building is a three-dimensional work of applied art. Yet I think we intended to exclude buildings, as distinct from their plans, from copyright protection.[62]

The final reference was made by Barbara Ringer who summed up the comments on the report:

> There was a fairly widespread feeling that there is no need to mention architectural works separately — that they are a form of "works of applied art," and can be dealt with as part of the whole picture. We have adopted that recommendation.[63]

The "whole picture" referred to by Ms. Ringer was the Office's dual-track approach -- having a copyright revision bill and a separate design bill for works of applied art proceed (and hopefully pass) at the same time.

In 1965, the Register issued a Supplementary Report in order to explain the 1965 revision bill and the decisions made about its provisions.

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[59] Id. at 269.

[60] Id. at 330.

[61] Id. at 394. Mr. Tannenbaum had earlier commented on the Strauss study as well.

[62] COPYRIGHT LAW REVISION, Part 3. Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments on the Draft at 44 (Sept. 1964).

[63] Id. at 188.

The sole reference to architectural works was to the design of nonfunctional architectural works as encompassed within the definition of "pictorial, graphic, or sculptural works."[64]

For the next ten years, the revision process was occupied with other issues such as cable television. In 1975, the Senate passed both a copyright revision act and a design bill (included as Title II of the omnibus copyright revision). The House, however, was opposed to separate design legislation at that time. The question then arose how to treat works of architecture, which the Copyright Office had considered including in the copyright revision legislation but had ultimately decided to include in the design legislation. The House Judiciary Committee report explains that such works, if they met the standard of separability, are to be regarded as "pictorial, graphic, or sculptural works:"

> A special situation is presented by architectural works. An architect's plans and drawings would, of course, be protected by copyright, but the extent to which that protection would extend to the structure depicted would depend on the circumstances. Purely nonfunctional or monumental structures would be subject to full copyright protection under the bill, and the same would be true of artistic sculpture or decorative ornamentation or embellishment added to a structure. On the other hand, where the only elements of shape in an architectural design are conceptually inseparable from the utilitarian aspects of the structure, copyright protection for the design would not be available.[65]

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[64] Part 6 at 5.

[65] H.R. REP. NO. 1476, 94th Cong., 2d Sess. 55 (1976).

We interpret this passage as follows:

1. Architectural plans and drawings are protected without the need for a separability analysis;
2. Protection for architectural structures is available under the following circumstances;
    a. Purely nonfunctional or monumental structures are protected without the need for a separability analysis;
    b. Artistic sculpture or decorative embellishment added to a structure is (generally) protected under a separability test.

Post-1976 Copyright Act W.I.P.O Consultations

In 1978, the general effective date for the 1976 Copyright Revision Act, the World Intellectual Property Organization (W.I.P.O.) convened a Group of Consultants to review recent copyright legislation in, among other countries, the U.S., with a view to analyzing compatibility with the Berne Convention. The question of works of architecture was only briefly touched on, as reported by Copyright Office staff:

> We then proceeded to try to discuss the protection of works of architecture in the United States. The Berne Convention does include works of architecture as an example of a literary, scientific, or artistic work which shall be protected. We went through the provisions of the new law dealing with industrial designs and gave some explanation of how it operates, and the general judgment of all those concerned, I think, could best be described in that great Italian gesture, "Eh." That's pretty much the extent of the discussion of architectural works.[66]

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[66] Report of June 7, 1978, Group of Consultants' Meeting, Transcript of talk to Copyright Office staff given by the General Counsel Jon Baumgarten, at 17.

Copyright Office Regulations and Practices Under the 1976 Act

37 CFR 202.3(b) (iii) indicates that two-dimensional and three-dimensional works of the fine, graphic, and applied arts, as well as technical drawings are covered in Class VA. 37 CFR 202.10 indicates: "[I]n order to be acceptable as a pictorial, graphic, sculptural work, the work must embody some creative authorship in its delineation or form."

Compendium II of Copyright Office Practices fleshes out these skeletal statements. Chapter 500 of the Compendium is devoted to pictorial, graphic, and sculptural works. Paragraph 501 states:

> Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of the utilitarian aspects of the article.

"Works of art" are deemed to include the "separable artistic features of two-dimensional and three-dimensional useful articles." [67]

Section 503.01 notes:

> The registrability of a work of the traditional fine arts is not affected by the style of the work or the form utilized by the artist. Thus, the form of the work can be representational or abstract, naturalistic or stylized. Likewise, the registrability of a work does not depend upon artistic merit or aesthetic value.

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[67] COPYRIGHT OFFICE PRACTICES, COMPENDIUM II, Chapter 500, at p. 500-1, Par. 502.

Standard designs "such as common architectural moldings, or the volute used to decorate the capitals of Ionic and Corinthian columns" are not subject to protection.[68]

We noted above that the separability test is a requirement for pictorial, graphic, or sculptural elements contained in "useful articles."[69] The compendium contains the following discussion of this important principle:

> Conceptual separability means that the pictorial, graphic, or sculptural features, while physically inseparable by ordinary means from the utilitarian item, are nevertheless clearly recognizable as a pictorial, graphic, or sculptural work which can be visualized on paper, for example, or as a free-standing sculpture as another example,independent of the shape of the useful article, i.e., the artistic features can be imagined separately and independently from the useful article without destroying the basic shape of the useful article. The artistic features and the useful article could both exist side by side and be perceived as fully realized, separate works -- one an artistic work and the other a useful article.[70]

Paragraph 510 states that architectural drawings and models are considered to be "scientific works." With respect to scientific or technical works, paragraph 510.04 adds that "the application for registration of a claim to copyright in an architectural drawing of a building should contain no statements which imply that the registration extends to the building."

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[68] Id. at p. 500-5, Par. 503.02(b).

[69] A "useful article" is defined in Section 101 of the Copyright Act as "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information."

[70] Id. n. 69 at p. 500-11, Par. 505.03.

The Berne Implementing Legislation of 1988

Hearings on and Passage of Berne Implementing Legislation in the Senate

On May 16, 1985, under the chairmanship of Senator Charles Mc.C. Mathias Jr., of Maryland, the Subcommittee on Patents, Copyrights and Trademarks began hearings on possible Berne adherence by receiving testimony principally from government witnesses, but without introduction of a bill to implement legislation necessary to change U.S. law in ways to make it compatible with the Berne Convention standards.

The purpose of the hearings was to discover which provisions of U.S. law would need revision if adherence was felt desirable. The only reference to architectural works was in the Copyright Office's written statement:

> Works of ... architecture" and "three-dimensional works relative to ... architecture" are specifically listed in Article 2(1) of the Berne Convention in the enumeration of copyrightable subject matter. These works are listed separately, moreover, from "works of applied art" and "illustrations ... relative to ... architecture." Although the plain text of Berne appears to require copyright protection for original three-dimensional manifestations of an architect's work (which is clearly not the current United States law), the practice of Berne states should be surveyed to identify more precisely the nature of the Berne obligation.
>
> Under present United States law, copyright for two-dimensional technical drawings (like architect's blueprints) does not protect the utilitarian object portrayed. 17 U.S.C. {113. The original artistic features of utilitarian articles can be protected by copyright, but only to the extent that the "design incorporates pictorial, graphic, or sculpture features that can be identified separately from and are capable of existing independently

> of, the utilitarian aspects of the article." 17 U. S. C. (101 (definition of "pictorial, graphic, and sculptural works"). The overall shape of a utilitarian article is not protected by United States copyright, no matter how artistic or attractive the shape may be. [71]

In preparation for a second day of hearings scheduled for April 15, 1986, the Copyright Office and the Senate Subcommittee staff prepared a draft discussion bill and commentary. Regarding works of architecture, the draft proposed amending the definition of "pictorial, graphic and sculptural works" in Section 101 to exclude works of architecture. A new definition of "architectural works" would be provided, and would include "two-dimensional and three-dimensional technical drawings, plans, sketches, models, designs and designs and sculptures relative to the art or science of [constructing buildings]."

The commentary on the draft states:

> Presently, the U.S. copyright law protects architect's blueprints as two-dimensional technical drawings, but does not protect the utilitarian object portrayed nor preclude copying or constructing the work in three-dimensional form. 17 U.S.C. §101, 113.
>
> Although greater protection is necessary to comply with Berne, the extent of protection required is unclear. And questions raised about the Convention's mandated scope of protection for architectural works have been resolved differently by member countries. Thus, although France, Japan and the United Kingdom, for example explicitly protect buildings or other structures by statute, the U.K., India and Australia appear to impose a higher standard of protectibility (artistic

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[71] U.S. ADHERENCE TO THE BERNE CONVENTION. Hearings, Subcommittee on Patents, Copyrights and Trademarks. Committee on the Judiciary. U.S. Senate. 99th Cong., 1st & 2nd Sess.

> character or aesthetic merit) on architectural works than on paintings, sculptures and drawings.
>
> The draft proposal excepts architectural works from the statutory definition of pictorial, graphic and sculptural works, thus removing architecture from the traditional copyright limitations on utilitarian works. An artistically designed building would clearly be protectible, despite its integrated utility. On the other hand, commonplace, standard or familiar building designs, no matter how functional, would not be entitled to statutory protection. And, a separate section limiting exclusive rights in architectural works clarifies that copyright in such works extends only to the artistic character or design of the building. The draft also precludes injunctions against construction of infringing buildings once such construction has substantially begun, and prohibits orders for demolition or seizure.[72]

The next witness to testify on architectural works was Irwin Karp, Chairman of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention.[73] Regarding the provisions of Article 2(1) of Berne with respect to architectural works, the report stated:

> Article 2(1) requires protection for three categories of works related to architecture:
>
> > (a) "works of ... architecture" (which we generally do not protect);

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[72]. Id. n. 73 at 660-661. The document reproduced in the 1986 Senate Berne Hearings is an earlier version of a document subsequently distributed to interested parties in a revised form. Although the latter version contains a number of differences from the former in some areas, the provisions on works of architecture and works relative to architecture are the same.

[73] "The Ad Hoc Committee" was comprised of a group of private sector attorneys formed at the request of the State Department. It provided preliminary and final reports on issues raised by possible U.S. adherence to Berne, Chapter XIII of the Final Report reviewed the compatibility of U.S. subject matter protection with Berne's requirements.

> (b) "illustrations ..., plans [and] sketches ... relative to ... architecture" (which we do protect); and
> (c) "three-dimensional works relative to ... architecture" (which, as embracing architectural models, we protect; but, as embracing the architect's final product (the buildings or other structures), we do not protect, except for certain "monuments").

"Works of ... architecture" have constituted a category of protected works under Berne since the Berlin version of 1908. The original Berne Convention (1886) did not include "works of architecture," but did include "plastic works relative to ... architecture." This latter category has appeared in the text of each subsequent version of the Convention, along with "works of ... architecture," although in Article 2(1) of the Stockholm (1967) and Paris (1971) Acts, the phrase is changed to read "three-dimensional works relative to ... architecture." Each of the Convention texts, from the 1886 Berne version through the 1971 Paris text, has also called for protection of "illustrations ..., plans [and] sketches ... relative to architecture."

(a) "Works of ... Architecture." Such a work would generally be, under the definition in 17 U.S.C. section 101, a "useful article": "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information."

Under the definition in section 101 of otherwise protectible "pictorial, graphic, and sculptural works" (known as "PGS works") it is provided that the "design of a useful article" is considered a protectible PGS work "only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article."

The protection of works of architecture is limited not only by the restrictions under section 101 as to which works qualify as protectible PGS works; the protection is limited also by the restrictions under section 113(b) on the scope of rights in a "work which portrays a useful article" and the restrictions under section 113(c) on the scope of rights in a "work lawfully reproduced in useful articles."

Thus, while adornments or embellishments to a building may be eligible for U.S. copyright protection, the buildings themselves -- useful articles as to which the art is inseparable from the utilitarian aspect -- are unprotectible under copyright.

In some cases, distinctive building designs or features have been protected under U.S. trademark or unfair competition laws (both common law and statutory), including section 43(a) of the Lanham Act. However, protection in these cases is tied to the importance of the design or appearance of the building in identifying or distinguishing the owner's goods or services and indicating their source. Consequently, such protection is not likely to be considered sufficiently analogous to copyright as to satisfy the Berne requirements.

Buildings or other structures are explicitly protected by statute in at least some of the major Berne countries, e.g., France, Japan, and the United Kingdom. However, a more definitive survey may determine whether, by reason of the statutory or case law of other Berne countries, an absence of true protection for buildings indicates a sufficiently limited scope of the Berne obligation for such works that U.S. law on the subject might be compatible.

(b) "Illustrations ..., plans [and] sketches ... relative to ... architecture."

(c) "Three-dimensional works relative to ... architecture."

> The definitions of PGS works and "useful article" under section 101 do not appear to bar these two Berne categories of works from protection, but the scope of rights is limited by section 113(b) and (c).[74]

It was the Ad Hoc Committee's conclusion that with respect to works of architecture, U.S. law was incompatible to the extent that it did not protect separable pictorial, graphic, and sculptural elements embodied in functional structures.[75]

At the invitation of the Subcommittee, Professor John Kernochan of Columbia University submitted comments on Berne adherence, including a review of the Ad Hoc Committee's Report and the Copyright Office/Subcommittee staff draft bill and memorandum. Regarding the Ad Hoc Committee's conclusion on works of architecture, Professor Kernochan stated:

> I agree with the Ad Hoc Committee's Report that study of what is actually done in the Berne countries to protect architecture and applied art might clarify our possible obligations in case we ought to adhere. It's possible that the U.S. could protect architecture without internal convulsions... .[76]

Regarding the Copyright Office/Subcommittee draft, Professor Kernochan asked whether the draft bill should not be amended to include "architectural structures."[77] Professor Kernochan also questioned informal proposals that only architectural works of an "artistic character and design" would "unavoidably involve administrators and courts, to some degree, in the kind of aesthetic judgments and criticism Mr. Justice Holmes eschewed in Bleistein v. Donaldson Lithographing Company, 188 U.S. 239, 251-2 (1903)." [78]

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[74] Id. at 510-511 (emphasis added).

[75] Id. at 158.

[76] Id. at 171.

[77] Id. at 175.

The next commentator on architectural works was the United States Council for International Business:

> The UDCIB has no problems with the Draft Bill's proposal to extend copyright protection to works of architecture, i.e., buildings, as apparently is necessary in order to comply with Berne.
>
> We do note in this connection, however, that the Draft Bill's definition of architectural works omits specific mention of "buildings" or "structures" in its non-exhaustive enumeration of the categories of such works. Because it is the absence of protection for buildings which makes our law incompatible with Berne in the area of architecture, and which this provision is designed to remedy, it seems both appropriate and important to include buildings in the list of examples. [79]

Only two other comments on architectural works were submitted. The first was from Professor Pamela Samuelson, who seemed to be concerned that protection for works of architecture would have an untoward effect by expanding protection for applied industrial designs. [80]

The last comment was submitted by the American Institute of Architects in response to questions from Senator Charles Mc C. Mathias. Due to time limitations, the comment reflected only the personal views of the author and not the AIA. However, because the comments represent the fullest expression of a possible AIA position, we set it out in full:

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[78] Id. at 178-179.

[79] Id. at 325.

[80] Id. at 720-722.

WRITTEN QUESTIONS SUBMITTED BY SENATOR MATHIAS

> Would any of the following features be required with respect to architectural works in order to comply with Berne? Would you support such a provision as a matter of policy?
>
> 1. Should the copyright owner's right in a building or other structure be limited to its esthetic features only or extend also it its functional or utilitarian aspects?
>
> 2. Should any protection of esthetic features of a building require as a minimum that such features not be staple, commonplace or familiar?
>
> 3. Should the consent of the owner of copyright in a building or other structure be required for the renovation, restoration or demolition of the structure?
>
> 4. Should the copyright owner's rights in a building or other structure be such as to prohibit the erection of a substantially similar second structure by "reverse engineering" of the first structure (e.g., from photographs or other depictions) without any direct copying of the plans or blueprints for the first structure?
>
> 5. Should two-dimensional representations of works of architecture (e.g., photographs, drawings, or audiovisual works depicting protected buildings) be deemed to be non-infringing copies of the works?
>
> 6. Should an architectural work be a "work made for hire" if it is specially ordered or commissioned under a written agreement where the architect is not preparing the work as an employee in the scope of employment by the other party?

RESPONSES FROM THE AMERICAN INSTITUTE OF ARCHITECTS

The first through fifth questions posed in your letter are all premised on the same fundamental notion: that the owner of an architectural copyright possesses rights not merely in the plans and drawings for a structure, but in the aesthetic features of the structure itself. In light of this fact, it is clear that all five questions are governed by identical policy considerations. Therefore, I am providing a single general response which applies equally to each of the questions noted above.

The Corstitutional mandate for all copyright legislation is derived from U.S. Const. art. I, sec. 8, cl. 8, which states that Congress shall have the power:

> To promote the progress of science and the useful arts, by securing for a limited time to authors and inventors the exclusive right to their respective writings and discoveries.

The present proposed language would produce precisely the opposite result, frustrating rather fulfilling the Framers' intent by creating a "chilling effect" on architectural progress. The reasons for this conclusion are stated in detail below.

There are three aspects of architectural works: 1) ideas, (aesthetics); 2) media specifically designed to convey information regarding a structure, such a drawings and plans, and ; 3) "functional media", such as buildings, which serve a utilitarian purpose while simultaneously giving tangible expression to an architect's intellectual objectives. Currently, only the second of these three aspects is afforded copyright protection in the United States. The general public has benefitted, since this system permits the free flow of ideas which as given rise to many of the most admired examples of American architecture. The same results are by no means assured under the proposed changes implied in the questions. For example, the pleasing aesthetic unity presented by a New England fishing village would have been, at best, extremely difficult to achieve had someone possessed a copyright on white clapboard Cape Cod cottages and picket fences. A more modern example of this phenomenon is the multi-story hotel atrium, complete with glass elevators, skywalks, and hanging foliage. This concept, which is featured in, but not limited to, Hyatt Regency hotels, was originated by Atlanta architect John Portman and has "caught on" in a way that would not be possible under the proposed copyright system.

It is clear that the proposed language would encourage architectural homogeneity of quite a different sort. Architects would have a strong economic incentive to repeat their own earlier copyrighted work, in order to avoid the exposure to potential liability inherent increasing new, (and possible infringing), designs. The aesthetic unity of a New England fishing village is the result of the free exchange of ideas. Under the proposed language, however, unity would be achieved not by free choice, but out of fear of litigation. The present system permits architects to experiment by incorporating new stylistic ideas developed by others, but expressed in each architect's own and different way into their drawings. The end result is often a structure which is distinctly different but similar to this predecessor. It is also worth nothing that the proposed system could have a significant negative impact on the widely lauded concepts of stylistically homogenous neighborhoods and regional architecture, since it would encourage the work of individual architects, rather than geographic areas, to become similar.

A further problem with the proposed' language is that it blurs the distinction under United States law between copyright protection (protecting the written or graphic expression of an idea) with patent protection (protection of the idea itself or its physical manifestation). This is most evident in Question five, which asks whether "two dimensional representations of works of

> architecture" should be deemed to be "non-infringing copies." It is not the nature of the representation, but the source thereof which is of prime importance in determining whether infringement has occurred. In any event, no useful purpose is served by the erosion of this distinction. In fact, such erosion could lead to unnecessary confusion in an already complex field of law. Under these circumstances, an architectural copyright owner's rights should continue to extend only to the plans and drawings for a structure, and not to any features of the structure itself.
>
> Question six asks whether an architectural work should be a "work made for hire" if it is specially ordered or commissioned under a written agreement where the architect is not preparing the work as an employee in the scope of employment by the other party. This should be the result only if the contract between the parties expressly provides so. Otherwise, an architect would be precluded from ever repeating himself or herself, since the building owner would also own the copyright to the structure. If the proposals set forth in Questions one through five were also adopted, the effect on the profession would be devastating.
>
> It will be recalled that under those proposals, the only completely safe course for an architect to pursue would be to repeat his or her own prior, copyrighted designs. The effect of the proposal in Question six would be to foreclose even this limited source of inspiration to the architect.[81]

After the hearings, on June 18, 1986, President Reagan transmitted the treaty to the Senate for its advice and consent.[82]

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[81] Id. at 732-734 letter from Dale R. Ellickson to Senator Mathias, August 13, 1986.

[82] Senate Treaty Document No. 99-27, 99th Cong., 2d Sess. (June 20, 1986).

On October 1, 1986, Senator Mathias introduced the first Berne implementation bill, S.2904.[83] This bill would have amended Section 102 of the Act to add "architectural works" as an enumerated type of protectible subject matter. "Architectural works" were defined as three-dimensional works in the form of buildings, monuments, and other structures, as well as two-dimensional and three-dimensional works in the form of plans, sketches, technical drawings, diagrams, and models relating to such buildings, monuments, or structures." Section 113 would have been amended by adding the following:

> In any action for infringement of an architectural work by construction of a structure incorporating the architectural work, the court shall have the discretion to enjoin construction of the infringing structure or order its demolition or seizure, and in exercising its discretion the court shall consider whether construction of the structure has substantially begun, whether the infringement was willful, and whether monetary recovery would be wholly inadequate as a remedy for infringement.

An architectural work was defined a "work of the Berne Union" if it was erected in a Berne country. In explaining these provisions, Senator Mathias stated:

> There is a broad consensus that protection of architectural works under U.S. law requires adjustment for compatibility with Berne. But it is far from clear how extensive that has to be, both in terms of rights or subject matter.[84]

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[83] 99th Cong., 2d Sess. 1986; 132 Cong. Rec. S14508 (daily ed. Oct., 1, 1986.

[84] Id.

On May 29, 1987, Senator Leahy introduced S. 1301, a bill to implement the Berne Convention. S.1301's provisions on architectural works differed in a number of respects from Senator Mathias' S.2904. First, the definition thereof introduced a requirement that the work be of "an original artistic character," a standard that would also apply to two dimensional works relative to architecture. Second, a new section 119 would be added:

> (a) The exclusive rights of a copyright owner in an architectural work shall apply only to the artistic character and artistic design of the work, and shall not extend to processes or methods of construction.
>
> (b) The copyright in an architectural work does not include the right to prevent the making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations of the work, when the work is erected in a location accessible to the public.
>
> (c) The owner of a copyright in an architectural work:
>
> > (1) shall not be entitled to obtain an injunction under section 502 of this title to restrain the construction or use of an infringing building, if construction has substantially begun; and
> > (2) may not obtain a court order, under chapter 5 of this title, requiring that an infringing building be demolished or seized.
>
> (d) It is not an infringement of copyright in an architectural work for the owner of a building embodying such architectural work, without the consent of the author or copyright owner, to make or authorize the making of alterations to such building, in order to enhance the utility of the building.

In his floor statement introducing the bill, Senator Leahy declared: "There is no dispute that U.S. law currently falls short in this area."[85] Senator Leahy also explained the departures from Senator Mathias's bill as a result of his study of Representative Kastenmeier's bill, H.R. 1623, which "appears superior in this area ... ."[86]

On December 18, 1987, Senators Hatch and Thurmond introduced the administration's Berne implementation bill, S.1971. The definition of "architectural works" was similar to S.1301's but importantly excluded the requirement of an "original artistic character." S.1971 also contained a proposed Section 119 limiting rights in architectural works, and this section differed from S.130's by deleting the requirement that the work be erected in a location "accessible to the public" in order to be photographed without permission of the copyright owner of the work of architecture. Finally, S.1971 was slightly more permissive (or at least explicit) regarding the ability of owners of buildings to make alterations thereto.

In a sectional analysis of the bill, Senator Hatch wrote that the extension of protection to architectural works was signed to bring the subject matter of U.S. law fully into compliance with the subject matter covered in Article 2 of the Berne Convention.[87]

The Senate resumed hearings on Berne adherence on February 18, 1988. The first witness was Representative Kastenmeier, who addressed the issue of architectural works in both his oral and written remarks. Because the written remarks are more extensive, we reproduce those:

> The protection of architectural works is a special matter. We have not yet decided on

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[85] 133 Cong. Rec. S7370, (Daily ed. May 29, 1987).

[86] *Id*.

[87] 133 Cong. Rec. S18410 (Daily ed. Dec. 18, 1987).

the best approach to take, but I would like to share with you my assessment of the problem.

Initially, all the bills assumed that it was necessary to introduce specifically a reference to architectural works as a subject matter of copyright and, once having done so, a number of specific exemptions and limitations had to be drafted to protect the reasonable interests of builders, consumers and the public generally. It was certainly not my intent to provide copyright protection for functional or utilitarian aspects of architecture. In general, any protection for architectural works must be subject to the limitations which extend to other pictorial, graphic and sculptural works and therefore preserve the "idea-expression dichotomy."

Despite the original assumption, during House hearings convincing testimony suggested that present U.S. copyright law already protects works of architecture and works relating to architecture (such as blueprints and models) so as to meet the general standards of the Berne Convention. Therefore, under a minimalist approach, we might not have to legislate at all.. Very little testimony addressed the question of appropriate protection for architectural works and, although representatives of architects approved of the proposed step, with necessary amendments, it did not appear to be a crucial matter to them.

I am concerned about moving precipitously in a matter which touches very fundamental lines, long drawn in our copyright law, with respect to the non-protection under copyright of creativity more appropriate to design or patent protection. I am simply not satisfied that we know enough to legislate with confidence. Whether we should extend substantial protection to architecture and materials relating to architecture under the general category of pictorial, graphic and sculptural works, subject to all the limitations applicable to such works, can be considered after adherence to Berne. This consideration can be in the context of design legislation, by a specially appointed

> commission or appropriate governmental agencies.[88]

In a written statement submitted for the hearing, Representative Moorhead also referred to architectural works:

> It is generally agreed that the Berne Convention requires a higher level of protection for architectural works than that provided under existing U.S. law. H.R. 2962 would raise the standards for protection without compromising practices in the real estate and construction industries. The bill provides that protection does not extend to the process or method of construction. The bill also limits the remedies available for infringement by excluding injunctive relief against an infringing building or structure if construction has substantially begun, and by providing that a court may not order the impoundment, seizure or destruction of an infringing building.
>
> Barbara Ringer, the well-known and well-respected former Register of Copyrights testified before our Subcommittee that it's not necessary to amend our copyright law in the area of architectural works in order to comply with Berne. Therefore, the major changes made by H.R. 2962 and other bills is unnecessary and may open a "can of worms". Her recommendation makes sense and we will review it closely.[89]

The next witness to address the issue was Register of Copyrights, Ralph Oman. In brief oral remarks, Register Oman stated:

> We have really had insufficient public debate on this extremely complex area of the law, and we can't yet assess the impact of protecting under copyright an architect's final product; in other words, buildings, and other structures. I am confident that the adherence

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[88] THE BERNE CONVENTION. HEARINGS, Subcommittee on Patents, Copyrights and Trademarks, Committee on the Judiciary. Senate. 100th Cong., 2d Sess. S1301 and S.1971.

[89] Id. at 64.

> process can go forward on the basis of existing U.S. protection for blueprints and the other original artistic features of a building and also on existing noncopyright State law remedies.[90]

A more extended discussion was contained in Mr. Oman's written remarks:

> Under both S. 1301 and S. 1971, section 102 of title 17 would be amended to include "architectural works." Both proposals would add a definition of architectural works in section 101 of title 17, although S. 1301 defines the term in the plural, while S. 1971 uses the singular.
>
> Protection for architectural works would be a major change in American law. S. 1301 would limit protection to the "artistic character" of the building. This is consistent with Berne Union concepts on the subject. Yet, it is unclear how many of the total number of buildings constructed in the United States contain an "artistic character." Both S. 1301 and S. 1971 would make substantial changes in the architectural field, but the scope and nature of the change remains somewhat unclear.
>
> Both S. 1301 and S. 1971 would create new section 119 of title 17 setting forth several limitations on the exclusive rights in architectural works. S. 1301 limits protection to a building's "artistic character and artistic design" and would not extend protection to processes or methods of construction. S. 1971 articulates this principle somewhat differently by limiting protection "to rights specified in clauses (1), (2), (3), and (5) of section 106" of title 17. Under both proposals, the owner of a building embodying an architectural work, without the consent of the author or copyright owner, would be entitled to make alterations to enhance the utility of the building. S. 1971 provides for a right of demolition, while

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[90] *Id*. at 138.

> S. 1301 makes no specific mention of such a right.
>
> In studies on the Berne Convention, a consensus has been reached that protecting "architectural works" is a mandated obligation of the Convention. Both S. 1301 and S. 1971 meet this obligation by enumerating "architectural works" as a category of copyrightable subject matter in section 102. The limitations on this right by section 119 do not appear to violate mandated Berne Convention protection.[91]

Subsequently, Senator Heflin propounded two questions to Register Oman regarding architectural works:

> Question 1. In Representative Kastenmeier's testimony, he indicated that we may not need to alter our current law with respect to architectural works. Would you comment on this?
>
> Answer: I share Representative Kastenmeier's concern that we have not heard from all segments of the public affected by specific inclusion of works of architecture within the copyright law. The record has not been sufficiently developed for the Congress to make judgments about the scope of protection and the need for limitations on any rights in architectural works. Under these circumstances, it is better not to change existing law. We now protect architectural plans against copying. While we do not protect the structural or functional aspects of buildings, copyright can protect the separate artistic features, if any, that are independent of the utilitarian aspects of any useful article, including a building. Also, we can rely on existing state law remedies, in the nature of breach of contract or unfair competition, for example, to accord protection for architectural works, similar to the way in which the Senate bills rely on state law remedies to satisfy the moral rights obligations of the Berne Convention.

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[91] Id. at 151-153.

> Question 2. In those countries that protect the "artistic character and design" of a building, how do they differentiate between the artistic character and design and the functional or utilitarian aspects of the architecture?
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> Answer: The Copyright Office has little information about the experience of Berne member countries in protecting works of architecture. We know, however, that many countries apply a standard of "artistic character" to distinguish protected from unprotected designs when applied to utilitarian objects. Courts in those countries apply a qualitative standard that requires original, artistic effort in the creation of aesthetic design features. However, design features of buildings responsive primarily to engineering, structural, or other functional considerations would generally not be protected.[92]

The final comment on architectural works, by the American Institute of Architects, was a February written statement submitted to the House of Representatives.[93]

On April 13, 1988, the Subcommittee marked S. 1301 and favorably reported it, as amended, to the full Judiciary Committee. As reported out, the provisions on architectural works were radically revised, so that the sole reference was in an amended definition of pictorial graphic or sculptural works in Section 101 to include architectural plans. On April 14, 1988, the Senate Judiciary Committee favorably voted upon S. 1301 as marked up. The Committee's report,[94] explains the revised architectural works provision:

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[92] Id. at 182-183; March 14, 1988 letter from Ralph Oman, Register of Copyrights to Senator DeConcini.

[93] Id. at 547-548.

> In order to be compatible with the Berne Convention, U.S. copyright law must protect the subject matter that is entitled to protection under Berne. To ensure that U.S. law protects architectural works to the extent required by Berne, Section 4(1) amends the definition of "Pictorial, graphic, and sculptural works" contained in section 101 of Title 17, United States Code. The Act strikes from the definition the phrase, "technical drawings, diagrams, and models," and inserts in lieu thereof, "diagrams, models, and technical drawings, including architectural plans (emphasis added)."
>
> The U.S. copyright law, as explained by legislative reports and as applied by the courts, protects architectural plans and drawings. The 1976 Copyright Act did not expressly mention them in the definition of "Pictorial, graphic, and sculptural works" contained in section 101. See Copyright Law Revision, House Report No. 94-1476, 94th Congress, 2d Session (1976), p. 55 ("[a]n architect's plans and drawings would, of course, be protected by copyright..."). See also testimony of David E. Lawson, FAIA, before the House Judiciary Committee's Subcommittee on Courts, Civil Liberties and the Administration of Justice, February 9, 1988, p.4.
>
> The amendment made by this Act makes clear that, "pictorial, graphic, and sculptural works," include architectural plans and drawings and merely codifies the current law governing architectural plans and drawings. Thus, it will continue to be an infringement to reproduce the architectural plans themselves without permission of the copyright holder. Simply to construct any architectural work that is represented in copyrighted architectural plans remains subject, however,

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[94] S. REP. NO. 352, 100th Cong., 2d Sess. (1988).

to 17 USC 113, which is not changed by S. 1301.

This bill does not amend any other provision of the definition of "pictorial, graphic, and sculptural works," and deliberately leaves in place the final sentence of the definition, which states that the design of a useful article (also defined in section 101) shall be considered a pictorial, graphic, and sculptural work:

> only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of the utilitarian aspects of the article.

This same standard of physical or conceptual separability applied by the courts to other pictorial, graphic, and sculptural works applies to architectural works. Specifically, this means that even though the shape of a useful article, such as a building, may be aesthetically satisfying and valuable, the copyright law does not protect the shape. Only those elements, if any, that can be identified separately from the shape of the useful article (as a simple example, a gargoyle on a building) are copyrightable.

In the case of architectural work in addition to protection for separable artistic sculpture or decorative ornamentation, purely nonfunctional or monumental structures, as well as models, may be subject to copyright.

It is the committee's conclusion that U.S. Copyright law as modified by this Act, and other state and federal remedies, protect architectural works to the extent required by the Berne Convention.[95]

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[95] Id. at 8-9.

On July 14, 1988, the Senate Foreign Relations Committee reported out the Berne treaty. In its report, [96] the Committee briefly discussed architectural works:

> In order to be compatible with the Berne Convention, U.S. copyright law must protect the subject matter that is entitled to protection under Berne. To ensure that U.S. law protects architectural works to the extent required by Berne, the Judiciary Committees propose the amendment of existing law to include "architectural plans."
>
> It is the intent of the House and Senate Committees to merely codify the current law governing architectural plans and drawings. The same standard of physical or conceptual separability applied by the courts to other pictorial, graphic, and sculptural works applies to architectural works. Specifically, this means that even though the shape of a useful article, such as a building, may be aesthetically satisfying and valuable, the copyright law does not protect the shape. Only those elements, if any, that can be identified separately from the shape of the useful article (as a simple example, a gargoyle on a building) are copyrightable.
>
> In the case of architectural works, in addition to protection for separate artistic sculpture or decorative ornamentation, purely nonfunctional or monumental structures, as well as models, may be subject to copyright. [97]

On October 5, 1988 the Senate passed S. 1301. In a parliamentary move, the text of the Senate passed S. 1301 was passed as an amendment to

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[96] S. Exec. Rep. No. 100-17, 100th Cong. (1988).

[97] Id. at 4.

H.R. 4262 in order to give the implementing legislation a House bill number.[98] The sole reference to architecture was made by Senator Hatch:

> [T]he bill codifies the protection of architectural plans. Current U.S. copyright law protects architectural blueprints and similar plans, but it has not been expressly stated in American copyright law. S. 1301 will ensure continued protection for architectural plans, but copyright protection will not be extended to the architectural structure, itself. Duplication of a building will still be permissible if done by visual observance of the structure without the use of the copyrighted blueprints.[99]

Hearings on and Passage of Berne Implementing Legislation in the House

Early in 1987, the Subcommittee on Courts, Civil Liberties and the Administration of Justice formally began its deliberations on Berne adherence, with the introduction, on March 16th, of H.R. 1623 by Chairman Kastenmeier. Representative Moorhead, the ranking minority member of the Subcommittee, co-sponsored the bill. Section 4(a) of the bill would have amended Section 101 of the Act by providing:

> "Architectural works" are buildings and other three-dimensional structures of an original artistic character, and works relative to architectures, such as building plans, blueprints, designs, and models.[100]

In line with the Copyright Office's April 15, 1986 draft bill, the definition of "pictorial, graphic, and sculptural works" would have been amended to exclude architectural works. Instead, architectural works would have been separately included in the list of copyrightable subject matter in an amended Section 102(a). The exclusive rights granted to architectural works were to apply only to the work's "artistic character and artistic design" and not to "processes or methods of construction,"[101] and would not prevent the "making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations" when the work was constructed in a location accessible to the public. With respect to remedies, the copyright owner of an architectural work could not obtain an injunction to restrain the construction or use of an infringing building "if construction has substantially begun."[102] In no event could an infringing building be demolished or seized.

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[98] 134 Cong. Rec. S14567 (Daily ed. October 5, 1988).

[99] 134 Cong. Rec. S14559 (Daily ed. October 5, 1988).

[100] Section 4(b) would have amended Section 101 to provide that, in the case of architectural works if the work is erected in a country adhering to the Convention, it is a "Berne Convention work."

Owners of a building embodying an architectural work would be entitled, without the copyright owner's permission, "make or authorize the making of minor alterations to such building, or other alterations to such building in order to enhance the utility of the building."[103]

In his floor statement on H.R. 1623, Chairman Kastenmeier explained:

> Although an aspect of the Berne Convention not examined with serious scrutiny by any group, the protection of architectural works appears to be required by the Berne Convention in a fashion not now fully available under title 17. Specifically, while rights holders in

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[101] Section 9(a), providing a new Sec. 120.

[102] _Id_. at 9(c).

[103] Sec. 9(d).

> two-dimensional architectural plans or blueprints may enjoy copyright protection in such works as considered "pictorial works," such a copyright has not extended to the exclusive right to control the building of the structure so depicted in three dimensions. The right of an architect to control the construction of his or her work is therefore given a basis in our Copyright Act by these amendments.[104]

Regarding the bill's limitations on exclusive rights in architectural works, Chairman Kastenmeier stated:

> New section 120 ... permits others to make two-dimensional reproductions of a copyrighted building without infringing the building copyright, when the building is in a location to which the public has access. Even when a building is protected by copyright, remedies for another's construction of an infringing building are limited. If construction of an infringing building has substantially begun, that is, structural work has been at least partially completed, no injunctive relief will be available to stop construction, nor shall an infringing building be subject to demolition or seizure. Unsaid, but worth nothing, is the fact that architectural works would be subject to all the limitations and exceptions found in the present copyright law, particularly fair use. Further, owners of buildings embodying architectural works are allowed to modify such structures without fear of violating either the economic or moral rights of the architect, so long as the modifications are minor, or are necessary to enhance the utility of the building.[105]

On July 6, 1987, Secretary of Commerce Malcolm Baldrige transmitted proposed Berne implementation legislation to Speaker of the House Jim Wright. In a letter accompanying the proposal, Secretary Baldrige noted that copyright protection for architectural works was a change necessary to permit adherence to Berne. [106]

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[104] 133 Cong. Rec. H. 1295 (Daily ed. March 16, 1987).

[105] _Id_.

On July 15, 1987, Representative Moorhead, on behalf of the Administration, introduced the proposed legislation as H.R. 2962. Like H.R. 1623, H.R. 2962 provided protection for works of architecture. An architectural work was defined as "a work such as a building or other three-dimensional structure and related works such as plans, blueprints, sketches, drawings, diagrams, and models relating to such building or structure." [107] This definition differs from that of H.R. 1623 principally by deleting the latter's requirement that the work be of an "original artistic character."

H.R. 2962's limitations on exclusive rights in architectural works were substantially the same as those in H.R. 1623. Among the differences were: H.R. 2962 would have expressly prohibited copyright in "purely utilitarian features of such works." In addition to permitting minor alterations for enhancement of repairs under H.R. 2962, the owner of the building could also "reconstruct or authorize the reconstruction of the building or structure," thereby, according to Representative Moorhead, giving more control over the copyrighted building once construction is complete. Unlike H.R. 1623, the exemption for certain two dimensional reproductions of a copyrighted three-dimensional architectural work would not be limited to architectural works that are accessible to be public.

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[106] BERNE CONVENTION IMPLEMENTATION ACT OF 1987. Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary. House of Representatives. 100th Cong., 1st and 2d Sess. H.R. 1623 (June 17, July 23, Sept. 16 and 30, 1987, Feb. 9 and 10, 1988 [Hereinafter House Berne Hearings].

[107] Section 4.

On June 17, 1987, the House began its hearings on Berne adherence. Regarding architectural works, Ralph Oman, the Register of Copyrights stated that: "Although the plain text of Berne appears to require copyright protection for original three-dimensional manifestations of an architect's work (which is clearly not the current United States law), the practice of Berne states should be surveyed to identify more precisely the nature of the Berne obligation." [108]

The Register further explained:

> "Works of ... architecture" and "three-dimensional works relative to ... architecture" are specifically listed in Article 2(1) of the Berne Convention in the enumeration of copyrightable subject matter. These works are listed separately, moreover, from "works of applied art" and "illustrations ... relative to ... architecture... ."
>
> Under present United Sates law, copyright for two-dimensional technical drawings (like architect's blueprints) does not protect the utilitarian object portrayed. 17 U.S.C. Sec. 113. The original artistic features of utilitarian articles can be protected by copyright, but only to the extent that the "design incorporates pictorial, graphic, or sculptural features that can be identified separately from and are capable of existing independently of, the utilitarian aspects of the article." 17 U.S.C. Sec. 101 (definition of "pictorial, graphic, and sculptural works"). The overall shape of a utilitarian article is not protected by United States copyright, no matter how artistic or attractive the shape may be.
>
> The Ad Hoc Working Group concluded that, at least with respect to works to foreign origin, the United States law provides insufficient protection to buildings and other works of architecture for adherence to Berne. The

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[108] House Berne Hearings at 55.

> Working Group noted that buildings and other structures are explicitly protected by statute in France, Japan, and the United Kingdom.

The Register then examined the provisions of H.R. 1623 on architectural works:

> Under H.R. 1623, section 102 of title 17 would be amended to include "architectural works." Section 101 would define such works as "buildings and other three-dimensional structures of an original artistic character, and works relative to architecture, such as building plans, blueprints, designs, and models." New section 120 of title 17 would create several limitations on the exclusive rights in architectural works. Protection would be limited to a building's "artistic character and artistic design" and would not extend to processes or methods of construction. Pictorial representations of architectural works would be permitted and remedies of injunction and demolition would be curtailed. The owners of a building embodying an architectural work, without the consent of the author or copyright owner, would be entitled to make "minor alterations" or "other alterations to such building in order to enhance the utility of the building."
>
> In studies on the Berne Convention, a consensus has been reached that protecting "architectural works" is a mandated obligation of the Convention. H.R. 1623 meets this obligation by enumerating "architectural works" as a category of copyrightable subject matter in section 102. The limitations on this right by section 120 do not appear to violate mandated Berne Convention protection.
>
> Protection for architectural works would be a major change in American law, and represents a major obstacle to United States adherence to the Berne Convention. Protection would be limited to the "artistic character" of the building. This is consistent with Berne Union concepts on the subject. Yet, it is unclear how many of the total number of buildings constructed in the United States contain an "artistic character." Of all the homes built

> in the United States in 1986, what percentage would have been copyrightable had H.R. 1623 been in effect: 1%, 5%, 25%, 50%, or 90%? The question is, of course, impossible to answer. It can only be said that H.R. 1623 makes substantial changes in a large domestic industry, but the scope and nature of the change must await clarification at future hearings.
>
> H.R. 1623 could also impact the rights of home owners, commercial real estate owners, developers, and public agencies regulating land use. Several questions occur. Would the provision preclude the owners of copyrighted buildings from making substantial cosmetic changes without the consent of the copyright owner? Would it preclude the owners of a copyrighted building from demolishing the building in order to erect a new structure? Would it limit the discretion of local zoning boards? Changes such as these could portend major shifts in business practices in the United States.

In testimony on the bill, the following colloquy between General Counsel Dorothy Schrader and Chairman Kastenmeier occurred:

> MS. SCHRADER. Then to continue to other points addressed by the bill, the bill would establish for the first time in the United States protection for architectural works. This would be a major change in our law. The bill contains a number of limitations. The protection would be only for the artistic character of the building, and there are a number of exceptions to what the copyright owner can do with respect to the copyright in the work of architecture. But this is an entirely new subject matter, and it is one upon which, hopefully, there will be a lot of additional testimony. You may want to consider further limitations.
>
> One might, for example, exclude residences or express a higher standard of artistry as being required to protect the building higher than is applied for the usual work of art.

MR. KASTENMEIER. In that respect, as you know, I guess it is fair to say that we haven't been pressed very much to specifically protect architecture in terms of copyright.

On the other hand, there has been significant interest over the years in so-called design protection, even type face protection specifically.

Would design protection, as advocated by some, include architectural works, or are they inconsistent? What I'm asking is the contrast between what appears in Berne in the interest in this country, in additional coverage, additional subject matter when it comes [sic].

MS. SCHRADER. Berne, in Article 2, has an extensive listing of the subject matter that is covered. And works of architecture are essentially covered by the phrase "three-dimensional works" relative to architecture.

There is a separate description for "Yes, works of applied art" is the phrase in the Berne Convention. So they are definitely mentioned, and industrial design would be covered to some extent. But it's not a binding obligation necessarily. That is, you can protect that subject matter generally within the Berne Convention, but there are other provisions later in Article 2, for example, that indicate that you have quite a bit of flexibility in deciding the extent to which you would protect applied art and industrial design under copyright.

Now, the Ad Hoc Committee report goes into this issue in some detail, and does express the view that possibly, and I stress possibly, there would be somewhat broader protection for applied design under the Berne Convention than under U.S. law.

The main question really is whether the United States -- whether any country -- can refuse to protect, to give, can deny protection completely to artistic features of applied design. We do that in this country if the artistic features are not separate from the shape of the utilitarian article.

> My own opinion is that our law is consistent with Berne with respect to works of applied art. But I do bring to your attention the comments of the Ad Hoc Committee.

The next reference to works of architecture did not occur until the Subcommittee's February 9, 1988 hearing, when the American Institute of Architects testified.

The AIA generally favored H.R. 1623's approach to protection of architectural works, with certain reservations. First, the AIA strongly objected to the "artistic character" requirement for copyright in architectural works.[109] Regarding the provision on moral rights, the AIA stated that as a practical matter it was "not at all clear that [they] ... would be very meaningful for architectural works."[110]

The AIA desired perceived implications of two provisions be made express. First, since H.R. 1623 provides that copyright in architectural works was not infringed by photographs or pictorial representations, the AIA construed this as implying that such copyright is infringed by "the unauthorized building from ... plans or an architectural reproduction of the work."[111] Second, since H.R. 1623 also provided that no injunction against an infringing building was available once construction had been

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[109] Id. at 640.

[110] Id.

[111] Id.

"substantially begun," the AIA wanted it expressly stated that injunctions were available where construction had not been substantially begun.[112]

The AIA's position became somewhat less clear during the Subcommittee's examination of the witness. In response to a question from Chairman Kastenmeier regarding whether the U.S. could join the Berne Union without modifying its law with respect to works of architecture, the AIA witness testified that the U.S. could, even though, in his view the Convention would prohibit the construction of a building based on infringing plans, while U.S. law would not.[113]

On February 10, 1988, the Subcommittee resumed hearings and heard from Professor Paul Goldstein. During his questioning of Professor Goldstein, Chairman Kastenmeier raised the issue of protection for works of architecture, including whether they might be protected under design legislation. Professor Goldstein responded as follow:

> I think it's a "can of worms." I think it's a case where if you balance ethical sense against dollars and cents, the dollars and cents win out. Ethically it might seem appropriate to go the Berne route--if it is, in fact, the Berne route, in terms of the laws of member states--and expressly include protection for architectural works. But it seems to me if Congress were to do this, it would be introducing a whole new concept into the copyright law, with many of the complications and much of the uncertainty and confusion that surrounded, for example, the introduction of computer software as protectible subject matter.

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[112] Id. at 640-641. The AIA also requested that a definition of "substantially begun" be added.

[113] Id.

> Just to pose some examples, if somebody wants to tear down a house, or if the house has to be destroyed so a state highway can go through, how does that fare against the moral right, be it an express moral right under 106(a) or a moral right under other state and federal law? What about local zoning legislation? How would it affect the work of local architectural review boards? I think that that just skims the surface, and I suspect the AIA testimony raised some more questions.
>
> I am comforted by the fact that existing law forms the basis for substantial protection of architectural works in this country. The House Report on the 1976 Act, in referring to section 101's definition of artistic works, deals with the notion of both physical and conceptual separability. Courts have interpreted conceptual separability in a way that would enable protection of substantial features of architectural works without monopolizing their utilitarian content. I think that that is certainly a sufficient basis for complying with Berne. I think it's a good way to proceed for the time being.[114]

As we interpret this final sentence, it indicates a view that existing law protects conceptually separable pictorial graphic and sculptural elements embodied in works of architecture, a position also taken, as the witness noted, in the 1976 House Judiciary Report.[115]

The next witness was Barbara Ringer, former Register of Copyrights. In addressing the question of copyright for works of architecture, Ms. Ringer testified that not enough study of the issue had been conducted, but she did endorse Professor Goldstein's view that the existing classification of pictorial, graphic, and sculptural works included "works of architecture." [116]

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[114] Id. at 679-680.

[115] Id. at 67.

No other witnesses testified on the issue, although a number of the written statements and subsequent correspondence to the Subcommittee did. The Association of American Publishers, in a November 6, 1987 statement, requested that if protection for works of architecture was enacted, that that protection be limited to the unauthorized construction of substantially similar buildings; thus, the depiction of a work of architecture by photographs, illustrations, paintings, and computers as well as "reproductions" in motion pictures and broadcasts would not constitute infringement of the work of architecture. [117] The AAP also requested that the term "accessibility" be deleted. [118] This position was endorsed by the Information Industry Association. [119]

The Associated General Contractors of America, through the AIA, submitted a letter favoring H.R. 1623 and H.R. 2962's provisions granting the copyright owner in a work of architecture the right to prevent unauthorized construction of a building from copyrighted plans. The letter stated that "[c]opyright owners may be developer/contractors as well as architects or building owners. The protection, therefore, potentially benefits all construction industry groups." [120]

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[116] Id. at 689.

[117] Id. at 826.

[118] Id.

[119] Id. at 741.

[120] Id. at 906.

During a congressional recess in November 1987, a delegation of five members of the Subcommittee as well staff travelled to Geneva, Switzerland and Paris, France for consultations with foreign copyright experts to receive their views on "whether the U.S. should join the Berne Convention and, if so, what changes would be necessary in our current law."[121]

There were only two fleeting references to the question of copyright for works of architecture. At the November 26, 1987 roundtable discussion, Mr. Jean-Louis Comte, Director of the Swiss Federal Intellectual Property Office, stated:

> [T]he Berne Convention is basically framed to protect literature and art, in other words, every cultural activity. This conception has always been somewhat modified by the explicit inclusion of scientific works. Indeed, some examples of protected works given in Article 2.1 of the Paris version go beyond this cultural scope: Topographical works, and works of architecture are good examples. Nevertheless, all categories of works mentioned in the Convention have one thing in common: not their contents or ideas are protected but only their expression.[122]

Representative Berman made the only other reference to architectural works in the context of discussions on the non self-executing nature of the Berne Convention: "[J]ust from reading Mr. Kastenmeier's bill, our copyright law does not recognize architectural works; Berne does recognize architectural works ... ."[123]

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[121] H.R. REP. NO. 609, 100th Cong. 2d Sess. 9 (1988). A transcript of the Geneva consultations is reproduced in the House Berne Hearings at 1135-1217.

[122] Id. at 1181.

[123] Id. at 1709.

On March 9, 1988, the Subcommittee marked up H.R. 1623. As marked up, with respect to architectural works, the bill radically differed from its form on introduction. The sole reference to architecture appeared in an amended definition of "pictorial, graphic, and sculptural works" in Section 101 to include "architectural plans."

On March 28, 1988, a clean bill -- H.R. 4262 -- was introduced by Chairman Kastenmeier with twelve cosponsors. On April 28, 1988, the Committee on the Judiciary debated and then favorably reported out H.R. 4762, with two amendments, one concerning moral rights, the other jukeboxes.

The House Report explains the change in the legislation's approach to architectural works:

> [H.R. 4262 is] premised on the conclusion that the United States should not move precipitously on an issue that touches very fundamental concepts, long drawn in law, with respect to the non-protection under copyright of creativity more appropriate to design or patent protection. In this regard, the amendment merely clarified that architectural plans are already protected under the general category of pictorial, graphic and sculpture works.

A more extensive discussion of the issue is given in the main text of the report:

> Article 2(1) of the Berne Convention requires protection for three categories of works related to architecture:
>
> (a) "works of ... architecture";
> (b) "illustrations ... plans [and] sketches ... relative to ... architecture; and
> (c) "three dimensional works relative to ... architecture".
>
> "Works of architecture" have been protected in some form under Berne since 1908, the concept

of three-dimensional works being added in 1967.

Under the 1976 Copyright Act, a work of architecture is generally embodied in a "useful article." As such, it may be protected as a "pictorial, graphic, and sculptural work" only if, and only to the extent that, its design "incorporates pictorial, graphic, or sculptural features" that can be identified separately from, and are capable of existing independently of, utilitarian aspects of the useful article."

Thus, while adornments or embellishments to a building may be eligible for U.S. copyright protection, the function or [sic] aspects of buildings are not.

The 1976 Act makes clear that architectural plans and drawings are protected by copyright, since, in this regard, they are no different from other drawings.

While there is substantial debate about whether the copyright laws prevent the use by someone other than the copyright holder of a copyrighted plan in the construction of a building, there is no doubt that the unauthorized copying of a plan or drawing of an architectural nature is considered a copyright infringement.

H.R. 1623, the original bill introduced by Representative Kastenmeier, followed the advice of the Copyright Office, the Administration, and the Ad Hoc Working Group. It proposed to amend the Copyright Act to explicitly provide for protection of buildings and structures, albeit with extensive exceptions and imitations. Unfortunately none of the witnesses who testified in the early hearings nor any of the experts consulted by the Subcommittee at the WIPO Roundtable Discussions, directly addressed issue of architectural works.

During the last day of hearings, both former Register of Copyrights Barbara Ringer and Professor Paul Goldstein testified that the requirements of Berne may not require the explicit treatment of architectural works in the manner contemplated in H.R. 1623. The witness from the American Institute of Architects (AIA) supported the provisions of H.R. 1623, but subsequently the AIA indicated that it would be preferable to make the construction of a building from copyrighted plans an act of copyright infringement.

As a result of the uncertainty that surrounded the architectural works language of H.R. 1623, the Subcommittee decided to scale back the extent of the amendments made to title 17. Thus, the bill reported by the Subcommittee only ratified the decision already made by the Congress in the 1976 Copyright Act that architectural plans are protected under the copyright laws. Although it is not an infringement merely to construct a building based on copyrighted architectural plans, it is an infringement to reproduce the plans themselves without permission of the copyright owner. Under current law, the structural or functional aspects of buildings are not subject to copyright protection. 17 U.S.C. 101 (definition of "pictorial, graphic, and sculptural work" and "useful article") and 113.

The Committee concluded that existing United States law is compatible with the requirements of Berne. In addition to a degree of protection under copyright against copying of plans and separable artistic works, additional causes of action for misappropriation may be available under state contract and unfair competition theories.

The bill leaves, untouched, two fundamental principles of copyright law: (1) that the design of a useful article is copyrightable only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from and are capable of existing independently of the utilitarian aspects of the useful article; and, (2) that copyright in a pictorial, graphic, or sculptural work, portraying a useful article as such does not extend to the reproduction of the useful article itself.

> Specifically, this means that even though the shape of a useful article, such as a building, may be aesthetically satisfying and valuable, the copyright law does not protect the shape. This test of separability and independence from the utilitarian aspects of the useful article does not depend upon the nature of the design — that is, even if the appearance of the useful article is determined by aesthetic, as opposed to functional considerations, only those pictorial, sculptural or graphic elements, if any, that can be identified separately from the shape of the useful article are copyrightable. Even if the three-dimensional design contains a separate and independent artistic feature (for example, a floral relief design on flatware or a gargoyle on a building), copyright protection would not cover the over-all configuration of the useful article as such.
>
> In the case of architectural works, in addition to protection for separable artistic sculpture or decorative ornamentation, purely non-functional or monumental structures may be subject to copyright.
>
> The Committee has not amended section 113 of the Copyright Act and intends no change in the settled principle that copyright in a pictorial, graphic, or graphic, or sculptural work, portraying a useful article as such, does not extend to the reproduction or manufacture of the useful article itself.[124]

On May 10, 1988, the House, by a vote of 420 - 0 passed H.R. 4262 as reported out of the Judiciary Committee. In floor comments on the bill, Chairman Kastenmeier made the only substantive reference to works of architecture:

> The protection of architectural works found in current copyright law is adequate to comport with Berne requirements on this matter. Rather than moving precipitously on an issue

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[124] H.R. REP. NO. 609 at 49-61.

> which touches very fundamental lines, long drawn in our copyright law, with respect to the nonprotection under copyright of creativity more appropriately protected by design or patent protection, H.R. 4262 adds a short amendment to current law, clarifying that architectural works are protected under the general category of pictorial, graphic, and sculptural works.[125]

On October 17, 1988, the House took up H.R. 4262 as passed by the Senate. Aside from Chairman Kastenmeier noting that both Houses had agreed on the architectural works provision, no other reference was made to the subject.

On October 31, 1988, in Beverly Hills, California, President Reagan signed H.R. 4262 into law as P.L. 100-568. It became effective on March 1, 1989 with U.S. adherence to the Berne Convention.

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[125] 134 Cong. Rec. H3082 (Daily ed. May 10, 1988).

CHAPTER 5: PROTECTION OF WORKS OF ARCHITECTURE UNDER THE BERNE CONVENTION

Article 2(1) of the (1971) Paris text of the Berne Convention, to which the United States adhered on March 1, 1989, mandates protection for both works of architecture and works related to architecture. This article has a long and relevant history.

The Draft Convention of September 1883 included, in Article 2, "plans," but did not specify their application to works of architecture.[1] The minutes of the second meeting on the draft, held on September 9, 1884, indicate that the question was asked by the German delegation whether Article 2 should be amended to include "three-dimensional works relating to geography, topography, architecture or the natural sciences."[2]

Representatives of Sweden and Switzerland agreed with the German proposal, whereupon the Conference endorsed the recommendation.[3] Minutes of the fifth meeting, held on September 17, 1884, contained a proposal to protect these works, and inclusion by the Plenary Committee in Article 4 of the Draft Convention of the following language: "The expression 'literary and artistic works' shall include...plans, sketches and plastic works relative to...architecture... ."[4] The original text of the Convention, adopted on September 9, 1886, replaced the term "plastic works" with "three-dimensional works." [5]

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[1] See Records of the International Conference for the Protection of Author's Rights, reproduced in The Berne Convention for the Protection of Literary and Artistic Works from 1886 to 1986 (W.I.P.O. 1986) at 83 (hereinafter 1986 Berne Convention Centenary).

[2] Id. at 90.

[3] Id.

[4] Id. at 95.

According to Professor Ricketson, while the Convention protects architectural plans, drawings, and models, in the 1880s "the actual result of the architect's work -- the completed building or structure -- did not receive specific legislative protection in any Berne Union country, although some accorded protection under the general heading of artistic works in their jurisprudence." [6] Ladas, in reviewing the contemporaneous authorities, concluded: "[t]he protection afforded by the prohibition of copying of the plans or drawings of an architect was not sufficient, because this did not protect against the copying of the architectural work itself." [7] The principal spokesperson for expanding protection under the Convention to include works of architecture was the Belgian author Jules de Borchgrave, who argued in an influential 1890 article that works of architecture should therefore be protected in the same way and to the same extent as the works of other artists.

In 1891, 1892, and 1894, the Association Litteraire et Artistique Internationale passed resolutions recommending the inclusion of works of architecture as protected subject matter within Article 4 of the Convention. In 1895, the International Office published a comparative study of the laws of several Berne Union member countries on the question, and similarly recommended inclusion. The following year, at the 1896 Paris

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[5] Id. at 228.

[6] Id. at 253-254.

[7] Ladas, 1 The International Protection of Literary and Artistic Works 223 (1938).

Conference on the Berne Convention, the French and Belgian delegations proposed adding works of architecture to the list of works protected by the Convention. Several delegations, most notably those of Germany and Great Britain objected, on the ground that their laws "did not protect works of architecture as such, but only the plans or drawings relating to architecture." The Report of the Conference states:

> As it proved impossible to come to an understanding in this regard, the idea of amending Article 4 had to be abandoned. However, the Committee proposes inserting in the Final Protocol a provision under which, in those countries where protection is granted to works of architecture themselves, such works shall be admitted to the benefits of the provisions of the Convention. Therefore, on the part of the countries in question, a concession without reciprocity is made to the countries of the Union whose legislation does not protect works of architecture themselves. If this concession produces effects, it is possible that the protection thus granted may determine a change in the legislation in the countries whose nationals profit from it.[8]

On May 4, 1896, an Additional Act and Interpretative Declaration was agreed upon, stating in relevant part:

> As regards Article 4...In countries of the Union where protection is accorded not only to architectural plans, but also to architectural works themselves, these works shall be admitted to the benefits of the Berne Convention and of this Additional Act.[9]

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[8] Id.

[9] Id. at 228.

In 1907, Germany, one of the original opponents of protection for works of architecture, amended its copyright law to provide for such protection.[10] The British, another opponent, appear to have been persuaded by M. de Borchgave's arguments. [11] Professor Ricketson speculates that this change in the British position was due to "evidence that, in other jurisdictions, only those architectural works which possesed an original character were accorded protection." [12]

The change in position by the Germans and British made possible the inclusion of works of architecture in the 1908 Berlin Revision of Berne. The Final Report of the Revision Conference indicates that the French, Italian, and German delegations jointly asked that works of architecture be included within the list of protected works in Article 4.[13] The Report then contains a somewhat lengthy, but informative summary of the issue:

> Works of architecture had hitherto met with opposition. It was recognized that plans and sketches should be protected, but it was said that "the work of architecture" itself, i.e. the construction, was not required to be protected and some legislation refused to grant such protection. In 1896, the Belgian and French Delegations had asserted that there is no reason to distinguish between the sculptor and the architect, that the latter's work deserved protection just as much as the former's.

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[10] Law on Artistic and Photographic Works of January 9, 1907, Article 2.

[11] See Correspondence Respecting the Revised Convention of Berne for the Protection of Literary and Artistic Works, signed at Berlin, November 13, 1908, Cd 4467, 6 (letter of G.R. Askwith and J. de Salis to Sir E. Grey).

[12] Id. n. 7 at 255-256.

[13] 1986 Berne Convention Centenary at 146.

They had to content themselves with a reference inserted in the Final Protocol, No.1, whereby "it is agreed ...[that] in countries of the Union where protection is accorded not only to architectural plans, but also to the architectural works themselves, these works shall be admitted to the benefits of the Berne Convention and of this Additional Act." It was observed that, on the part of the countries in question, a concession was made in this regard to the countries of the Union whose legislations did not protect works of architecture themselves. The German authorities, which had been against protecting works of architecture in 1896, abandoned their initial viewpoint in their proposals to the Conference. The text of the Final Protocol as given earlier would be replaced by the following: "The stipulations of the present Convention shall also apply to works of architecture. "It was logical then to ask, as the German, French and Belgian Delegations did, for works of architecture to be mentioned in Article 4 next to works of drawing, painting. The objection was raised that there was little point in doing so because difficulties never seemed to have arisen in that connection and, furthermore, because it was unacceptable that a building contractor or an architect who built a house with a facade comprising a door and six windows could complain because another building also had a door and six windows. In response, legal decisions were produced which established, first, that difficulties were indeed possible and, second, that they could be settled rationally by the courts. All protection would be denied to a very ordinary building in which the creator's personality is not revealed; it was the original, artistic work that was to be protected. In the end, the inclusion of works of architecture in the list of protected works was accepted without opposition; only the Swedish Delegation made reservations. The desires expressed on numerous occasions by the societies of

> architects of various countries have thus been rightfully met. [14]

Accordingly, Article 2 was amended to include works of architecture, [15] but without special provisions on publication or determination of the country of origin. Article 4 of the Berlin revision provided that "published works" were "works copies of which have been available to the public," [16] a definition which, in practice, would result in the mere construction of the original work of architecture not being considered a publication.

During the Berlin conference, "works of art applied to industrial purposes" were also included in Article 2, but only "so far as the legislation of each country allows." Works of architecture are not, therefore, considered to be works of applied art under Berne, a critical distinction, since, having adhered to the Berne Convention, the United States has committed itself to providing copyright protection to works of architecture. The United States no longer has the option, compatible with Berne, of according works of architecture under design laws as "works of applied art."

The next revision of the Berne Convention occurred in Rome in 1928. No reference to works of architecture or works related to architecture appears to have been made at this Conference.

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[14] Id. at 146.

[15] Id. at 229.

[16] Id. Article 4 also contained general provisons for determining country of origin.

At the Brussels Revision of 1948, special definitional provisions for "publication" and "country of origin" of works of architecture were proposed. The first and second reports of The Subcommittee on Article 4(4) contain identical recommendations that "the construction of a work of architecture shall not constitute publication," and, that "in the case of works of architecture, or of graphic and three-dimensional art, forming part of a building, the country of origin of the Union where these works have been built or incorporated in a building shall be considered as the country of origin."[17]

The Brussels Revision Act adopted these recommendations in Article 4(4) and (5).[18]

During the 1967 Stockholm Revision Conference, Article 4(5)'s provision on determining the country of origin for works of architecture received attention with a proposal that:

> where the country where a work of architecture and some other works of the same nature were erected or affixed to land or to a building would be the criterion for their country of origin..., and only in the absence of such a criterion would it be the nationality of the author.[19]

Furthermore, the records of the Conference contain this proposed refinement for determining the country of origin:

> [I]t was decided that the Report should state that the criterion for the location of works of architecture would apply only

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[17] Id. at 231.

[18] Id.

[19] Id. at 194.

> in respect to the original work. No protection under the Berne Convention could be claimed in respect solely of a copy of the work erected in a country of the Union if the original were still located in a country outside the Union.[20]

The Stockholm Act did amend Article 4(b) to provide that the country of origin provisions of the Convention are fulfilled, in the case of works of architecture, where the work is "erected in a country of the Union."[21] No distinction was made, however, between copies or the original of works of architecture.

No reference was made to works of architecture during the 1971 Paris Revision.

Begining in the late 1980's the World Intellectual Property Organization and UNESCO began preparations for a Draft Model Copyright Law. One important step in this process was the formulation of draft principles. A set of such principles was circulated in a 1988 Secretariat's Memorandum. One section discussed works of architecture. Because of the general unavailability of this material, we quote it in full:

> Principle WA1. (1) "Works of architecture" are buildings and similar constructions, provided they contain original creative elements as to their form, design or ornaments, irrespective of the purpose of buildings or similar constructions.
>
> (2) "Works relative to architecture" are drawings and three-dimensional models on the basis of which works of architecture can be constructed.

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[20] *Id*. at 195.

[21] *Id*. at 232. This provision supplemented but did not supersede the general provisions of Article 3.

Principle WA2. Works of architecture, as well as works relative to architecture, should be protected by copyright.[22]

Principle WA3. (1) The authors of works of architecture, as well as the authors of works relative to architecture, should enjoy the exclusive right of authorizing the reproduction, by any means and in any manner or form, of their works of architecture or works relative to architecture, respectively.

(2) The reproduction of works of architecture includes the construction of another work of architecture that is, in respect of some or all of the original elements, similar to the former work of architeture; it also includes the preparation, on the basis of works of architecture, of works relative to architecture.

(3) The reproduction of works relative to architecture includes construction, on the basis of those works, of works of architecture; it also includes the making of copies, in any manner or form, of the works relative to architecture.

Principle WA4. The authors of works of architecture should enjoy the exclusive right of authorizing alterations of their works, except alterations of a practical or technical nature which are necessary for the owners of the buildings or other similar constructions.

Moral Rights

Principle WA5. The authors of works of architecture or works relative to architecture should have the right to be named, as far as practicable and in the customary way, on their works as authors of those works.

Principle WA6. (1) The authors of works of architecture or of works relative to architecture should have the right to prohibit any

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[22] UNESCO/WIPO/CGE/SYN 3-III Part II, Draft Principles (April 11, 1988).

> distortion, mutilation or other modification of, or other derogatory action in relation to, the said works, which would be prejudicial to their honor or reputation.
>
> (2) If any modification or other derogatory action of the kind referred to in paragraph (1) takes place without the authors' knowledge or against their prohibition, the perpetrator of such modification or action should be obliged to have the former state reinstated, or to pay damages, according to the circumstances of the case.
>
> (3) Where their works have been altered without their consent, the authors of works of architecture should have the right to prohibit the association of their names with their works.

The Protection of the External Images of Works of Architecture

> Principle WA7. The reproduction of the external images of works of architecture by means of photography, cinematography, painting, sculpture, drawing or similar methods should not require the authorization of their authors if it is done for private purposes or, even if it is done for commercial purposes, where the works of architecture are on a public street, road or square or in any other place normally accessible to the public.

The draft principles were then explained in a draft report:

> Some delegations said, in relation to Principle WAI, that their national laws did not make a distinction between "works of architecture" and "works relative to architecture."
>
> As regards Principle WA(1), one delegation suggested that the reference to "buildings" should be replaced by a reference to "original expressions embodied in buildings" which notion should be used also in other contexts than where the mere notion of "building" appeared. This view was supported by another delegation which suggested that the reference could be to the original elements included in

a building or a structure. Still another delegation suggested that it should be clarified that the notion of "building" included also other fixed structures.

One delegation said that in its country the copyright law was under revision. So far, it was not being contemplated to grant copyright protection to "buildings," but only to plans and artistic ideas. Therefore, the delegation expressed reservation as to Principle WA1.

Another delegation, while expressing its approval of Principle WA2, said that it should be made clear in the principle that the copyright protection did not extend to functional aspects and that reproduction of such aspects did not amount to infringement of copyright.

In relation to Principles WA2 and WA3, one delegation stated that the construction of a building on the basis of a plan amounted to a reproduction of the work of architecture; another act of reproduction was when a new building was being constructed on the pattern of an existing one; these acts of reproduction were subject to the authors' authorization.

As regards Principle WA3(3), one delegation suggested that, in addition to construction, also the continuation of the construction should be referred to.

Concerning Principle WA3(2), one delegation stated that the notion of "similar" seemed insufficient, and that reference should instead be made to "substantial similarity." This view was supported by some other delegations.

Principle WA4 on the exclusive right of alteration gave rise to several comments. One delegation expressed the view that the principle, as drafted, represented an unclear balancing of the various interests involved and said that the principle would, in fact, imply a form of moral right. One delegation considered the right included in the principle as going too far.

Several delegations proposed that Principle WA4 should be merged with the principles on moral rights, because there was obviously an overlap between them. One of these delegations expressed the view that, to that effect, in Principle WA6(1) a reference should be made to Principle WA4. One delegation, supported by another delegation, suggested that the exclusive right in respect of alteration should be limited in the sense that the author should not be able to unreasonably refuse alterations which were of a practical or technical nature.

Concerning Principle WA6(3) on the right of the author to dissociate himself from a work altered without his consent, one delegation proposed that this would apply only if the alteration were a significant one. This view was supported by another delegation.

Some delegations expressed reservations concerning Principle WA7 as being too broadly worded. In the view of one delegation, the following words should be added, at the end of the principle: "or where the taking of the picture is part of a map produced by an aircraft or satellite;" in such cases, the taking of the picture should be allowed without authorization even if it was done for commercial purposes.

One delegation stated that the limitation of the author's rights provided for in Principle WA7 made it possible to produce, for instance, postcards or souvenirs of buildings and to sell them in great quantities without the author receiving any remuneration. Reference was in this context also made to the difference between use made of the external image of buildings outside or inside the normal context of the building.

An observer representing an international non-governmental organization said that Principle WA7 took away much of the rights of authors of works of architecture; one should, at least, in cases of use for commercial purposes, provide for a right of remuneration for the authors.

The draft principles and draft report were then commented on by a Committee of Governmental Experts:

> In the general discussion held at the meeting of the Committee of Governmental Experts on Works of Architecture, several delegations stated that, in general, the principles and comments contained in the memorandum prepared by the Secretariats were acceptable to their governments and that they would have comments to make only concerning details... . As the following paragraphs reflect, only relatively few comments were made which have made changes necessary in the text of the principles.
>
> Creations to be Protected as Works of Architecture
>
> The word "creative" was inserted in Principle WA1(1) between the words "original" and "elements" because there was agreement among the delegations that, in respect of works of architecture, it was particularly desirable to emphasize that buildings and similar constructions should be of an original and creative nature in order to qualify as works... .
>
> One delegation proposed that, in Principle WA1(1), reference should also be made to the artistic nature of buildings and similar constructions as a further condition of copyright eligibility. It was considered by the other participants, however, that such an approach might introduce an element that was too subjective to constitute a condition of copyright protection... .
>
> Economic Rights
>
> As far the right of reproduction was concerned, the delegations participating in the meeting of the Committee of Governmental Experts expressed their agreement on the contents of the memorandum and on the proposed Principle WA3, and no comments were made which would justify changes in the text of that principle.
>
> At the meeting, there was more extensive discussion on the right of alteration and Principle WA4 covering that right. Finally,

there was agreement about the need for the following two changes: First, the reference to alterations of great importance to the owner of the building or similar construction should be replaced by a reference to alterations of a practical or technical nature which is necessary to the owner of the building or other similar construction (so as to exclude any subjective elements from the principle). Second, the last part of the principle which referred to alterations amounting to distortions, mutilations, etc. — should be left out because that question is taken care of in Principle WA6(1) on the "right of respect...."

Moral Rights

There was agreement among the participants in the meeting of the Committee of Governmental Experts that, in Principle WA5 which dealt with the right to be named, it would more appropriate (because it was of more objective nature) to refer to the customary way of exercising that right rather than to the condition that that right should be exercised in good faith. Consequently, words "in the customary way" have been inserted into the first sentence of Principle WA5, after the words "have the right to be named," and the last two sentences have been left out.

No changes were proposed in Principle WA6 which dealt with the "right of respect."

The Protection of the External Image of Works of Architecture

At the meeting of the Committee of Governmental Experts, two questions were raised in respect of Principle WA7, namely, first, whether it should only cover the reproduction of the external image or also the internal elements of the work of architecture and, second, whether reproduction should be allowed, without any conditions, also for commercial purposes. However, no proposals for changes received sufficient support. Therefore, Principle WA7 has been reproduced without changes.

No further references to architectural works have been made in the model law meetings.

CHAPTER 6: FOREIGN LAWS ON WORKS OF ARCHITECTURE

As a part of this study, Congress requested a review of the laws of other Berne Union members, in order to shed light on the nature and scope of protection contemplated by the Convention for works of architecture.[1] Although the copyright laws of several countries make reference to buildings and structures, they all make a fundamental distinction between architectural works and buildings that we cannot overlook. Copyright law protects original expression which is usually embodied in physical media. "Literary works" are often embodied in books; copyright protects only the former and not the latter. Similarly, an "architectural work" can and usually must be distinguished from the building or other structure in which it is embodied. In short, as we shall shortly note, the protection of architectural works under copyright is fundamentally not about the protection of buildings *per se*; it is -- certainly within many of the states of the Berne Union -- about the protection of perceptible personal expression embodied in some, but not all, buildings.

As is certainly true of the United States, the quality of statutory copyright protection cannot be fully understood without careful reference to a large body of judicial interpretation. While we have noted more readily accessible decisions from a few selected countries, we are not now able to obtain and analyze relevant case law of all the other eighty-one Berne Union members.

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[1] We have excluded references to "works related to architecture," (*e.g.*, plans, drawings, and models) given their statutory basis in U.S. law. We have also not separately discussed the scope of rights generally granted to all categories of subject matter or to general limitations on rights. Where there are special references to works of architecture, we have noted them. The only references to works of architecture not noted concern national eligibility.

With these caveats, a number of common approaches run through the statutes. First, the majority of laws tend expressly to protect "architectural works," usually in addition to "works relative to architecture."[2] A number of important states protect works of architecture as a subclass of "artistic works" and, as the discussion, below, of the British law suggests, this classification may have important consequences limiting the scope of protectible architectural structures.[3]

Of the 81 countries surveyed, only three (Belgium, Greece, and Spain) did not provide for such protection in the statute. [4] Belgium has provided protection for works of architecture by court decision beginning in the nineteenth century. The same may, perhaps, be true of Spain and Greece. And, a number of states appear to regard the Berne Convention as self-executing and therefore may protect architectural works by virtue solely of their inclusion in the relevant text to which they adhere.

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[2] This is the case with Barbados, Benin, Bulgaria, Burkina Faso, Central African Republic, Congo, Costa Rica, Ivory Coast, Czechoslovakia, Denmark, Egypt, Fiji, Finland, France, the German Democratic Republic, Guinea, Iceland, Italy, Japan, Libya, Liechtenstein, Luxembourg, Madagascar, Mali, Mexico, Monaco, Morocco, Netherlands, Norway, Philippines, Portugal, Romania, Rwanda, Senegal, Sri Lanka, Sweden, Switzerland, Thailand, Tunisia, Turkey, Uruguay, Venezuela and Yugoslavia.

[3] States protecting architectural works as a subclass of artistic works include Australia, Austria, Brazil, Colombia,Cyprus, the Federal Republic of Germany, Ireland, Malta, New Zealand, Pakistan, Poland (where protection is as a work of "fine art"), South Africa, and the United Kingdom. Possibly related to protection of architectural works as a form of artistic work are provisions of a number of states which describe the relevant subject matter as an "architectural work of art." Such states include India, Israel, and Canada. It is interesting to note that states tending to lump architectural works with works of art or to limit the category to an "architectural works of art" reflect German or British common law traditions. Germany and Great Britain were the leading states resistant in the first instance to the expansion of protected subject matter under the Berne Convention to include "architectural works" generally.

[4] Eight countries make the provisions of Berne self-executing. Four did not specially provide for works of architecture in the enumeration of protected subject matter, but elsewhere provided exemptions from liability for the infringement of works of architecture, thereby indicating works of

Second, the majority of Berne Union members protect works of architecture without expressly imposing a higher level of originality, e.g., artistic merit.[5] Some laws expressly state that no such standard is required (Australia, Bulgaria, and Sri Lanka), while others provide special privileges, not accorded creators of other architectural works, to authors of works of architecture that possess such a character (Hungary, Italy, and Venezuela).

Several observations about the question of originality or artistic character as a requirement for protection of architectural works within the Berne Union may be in order and, indeed, may be particularly relevant to the situation in the United States. There is a distinction between artistic merit and artistic content. As in the United States, qualitative requirements such as artistic merit tend not to figure into copyrightability questions under foreign law or the Berne Convention.[6] In

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architecture are protected subject matter. We were unable to obtain a copy of the statute for Trinidad and Tobago.

Rwanda contains a unique provision, protecting works of architecture under its general copyright provisions and architectural styles under its folklore provisions.

[5] But cf. the statutes of the Federal Republic of Germany, India, Israel, Pakistan, and the United Kingdom, which required expressly that works of architecture possess an "artistic character or design." Commentators are split on whether this reference is, in practice, only the general standard of originality. See authorities cited in footnotes 9 and 12.

[6] WIPO, GUIDE TO THE BERNE CONVENTION 13 (1978).

connection with works of art, it is generally sufficient that the work can be commonly understood as an artistic statement and irrelevant that the particular statement is unattractive or undeserving of critical acclaim.[7] But there remains the conceptually vexing question of how to distinguish artistic from non-artistic statements; in short, regardless of its quality, is the material in question a work of art? And with respect to architectural works, must it be capable of being regarded as an artistic work in order to enjoy protection?

In the United Kingdom — whose laws have obvious influence throughout the Commonwealth — the 1911 Act included architectural works in the category of artistic works and relevant definitions made clear this meant "any building or structure having an artistic character or design, in respect of such character of design...provided that the protection given by this Act shall be confined to the artistic character and design and shall not extend to processes or methods of construction."[8] Although subsequent British Copyright Acts contain "a much simpler definition and protect original works of architecture being either buildings or models for buildings....[i]t is thought, however, that the simpler definition has not produced any substantial alteration in the law."[9] A leading commentator notes that the effect of the requirement of artistic character principally had the effect of excluding "common stock features which would not be sufficient to constitute a copyright work."[10] In short, one clear effect of the requirement of artistic character may well be to exclude standard or commonplace designs such as those found in vernacular architecture. These notions of a clear artistic character as a condition for protection of an architectural work, reflected at least at the surface of British and German influenced statutes, run strong in William Strauss' seminal analysis of U.S. copyright protection for architectural works.[11]

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[7] Thus, a commonly accepted definition of "artistic work" for copyright and neighboring rights purposes states: "An artistic work (or a work of art) is a creation intended to appeal to the aesthetic sense of the person perceiving it." WIPO, GLOSSARY OF TERMS OF THE LAW OF COPYRIGHT AND NEIGHBORING RIGHTS 13 (1980).

[8] United Kingdom Copyright Act, 1911, section 35(1).

[9] COPINGER AND SKONE JAMES, ON COPYRIGHT, Sec. 718, at 299 [Eleventh Ed., 1971].

Works of architecture are generally granted moral rights, (expressly in Canada, Colombia, Mali, Portugal, Rwanda, and the United Kingdom), a right that conflicts, on occasion, with the needs of building owners to make alterations to buildings embodying architectural works which they own and often commercially exploit. Hence, commonly encountered exceptions to moral rights in architectural works permit building owners to make changes to the work of "a technical nature or for purposes of practical utilization."

Works of architecture are often excluded droit de suite [12] and are often subject to special exemptions permitting certain reproductions of works (such as photographs, drawings, and paintings) when they are located in publicly accessible locations. Other limitations of reproduction rights are found where reproduction of the publicly accessible work of architecture is not the principal focus of the reproduction. On the other hand, private copying exemptions, found in many statutes, are expressly inapplicable to the reproduction of a work of architecture.

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[10] Id., section 719, at 299.

[11] Strauss, W., "Copyright in Architectural Works" (Copyright Revision Study No. 27, 1959), reprinted in COPYRIGHT SOCIETY OF THE U.S.A., 1 STUDIES ON COPYRIGHT 87, 99 (Arthur Fisher Memorial Edition, 1963).

[12] One obvious reason for such an exclusion is that resale of the building usually involves resale of the land as well. It is difficult, therefore, if not impossible, to distinguish how much of the value of the appreciation is attributable to the appreciation of the value of the building and how much is attributable to appreciation of the land.

Publication of a work of architecture is usually not defined, but typically excludes reproduction by photographs (India, Ireland, and Pakistan) or construction (Monaco and New Zealand). There are exceptions to this latter rule, however, with Japan, the Federal Republic of Germany, and the United Kingdom providing that construction of the building may be a publication of the work of architecture.

The term of protection foreign copyright laws accord to architectural works is, without variation, the general term of protection accorded other literary and artistic works.

Works of architecture are subject to the general infringement provisions for damages, subject to a commonly encountered exception to the effect that an injunction may not usually be granted against a substantially similar building once construction thereof has been begun, and infringing buildings may not be demolished.

In general, foreign laws influenced by the Berne Convention suggest certain broad conclusions about the nature of protection enjoyed by architectural works: first, whether assimilated to artistic works or as an express, separate category, architectural works are regarded as artistic creations whose case-by-case protectability depends--as with all works--upon their "originality." Second, "originality" can mean many different, overlapping things in Berne practice, including our common understanding that the work owes its existence to the author claiming to have created the work and has not been substantially copied from another work. It can also mean a condition of protectibility in that the work convey a personal intellectual, artistic, or other creative character. Third, the fact that a building embodying an architectural work has utilitarian or technologically dictated characteristics does not, in and of itself, deprive the work of a potentially protectible artistic character or aspect. Many statutes expressly exclude from copyright protection functional or engineering or utilitarian aspects that exist in architectural works. These rules suggest different conceptual approaches to reaching the same sort of balance between the protection under copyright of works of applied art -- and perhaps architectural works -- that we strive for in the United States. Fourth, foreign copyright laws generally accord to protected architectural works the same rights and remedies accorded other works. Fifth, highly specific exceptions to reproduction rights and moral rights in architectural works are common and tend to strike reasonable balances of interest between the architect and the owner of the building embodying the architectural work, on the one hand, and the general public in respect of architectural works forming a part of the public landscape, on the other.

The following material attempts to summarize for the Subcommittees' use and consideration, the statutory provisions of major foreign countries respecting copyright protection of architectural works.

ARGENTINA

Works of architecture are included in the list of protectible "scientific, literary and artistic works" in Article 1. There are no other references to works of architecture.

AUSTRALIA

Part II, Sec. 10, subparagraph (b) of the definition of "artistic work" states that "a building or a model of a building, whether the building or model is of artistic quality or not" is protected. Section 66 provides that copyright in a building is not infringed by the making of a painting, drawing, engraving or photograph or by inclusion of the building in a film or television broadcast if incidental to the "principal matters represented in the film or broadcast." Section 73 provides that a copyright in a building or the plans upon which the building is based are not infringed by reconstructing the building.[13]

Of importance also is Section 21(3) which provides that two-dimensional works can be infringed by reproduction in a three-dimensional form and vice versa. This is subject, however, to Section 71, which provides that no such infringement will arise if "the object would not appear to persons who are not experts in relation to objects of that kind to be a reproduction of the artistic work."[14]

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[13] See also Section 217.

[14] See Anchor, Mortlock, Murray, & Woodley Pty Ltd. v. Hooker Holmes Pty Ltd., [1971] 2 NSWLR 278 (infringement to copy plans or to reproduce the building); Lend Lease Homes Pty Ltd. v. Warrighal Homes Pty Ltd., [1970] 3 NWSLR (same), and, generally, Lahore, Intellectual Property Law in Australia 227-229 (Butterworth's 1977).

AUSTRIA

Section 3(1) states that "works of art" includes works of architecture. There are no other references to works of architecture.

BAHAMAS

The Bahamas does not have a separate domestic Copyright Act, but considers the provisions of Berne to be self-executing.

BARBADOS

Section 5(g) provides that works of architecture are protected. Section 24(1)(f) permits the reproduction of works of architecture in films if the work is permanently located in a place that can be viewed by the public, and the reproduction is for background purposes or is "incidental to essential matters represented."

BELGIUM

There is no express provision for works of architecture in the Belgium statute, which, without a definition of any kind, states in Article 1 that all "literary and artistic works" are protected. See also Article 21: "[a] work of art reproduced by an industrial process or applied to an industrial product shall nevertheless remain subject to the provisions of this Law."

It should be noted, however, that it was the Belgian delegate to the Berlin revision of Berne who was instrumental in getting works of architecture included in the convention, and that Belgian case law extended protection to works of architecture beginning in the nineteenth century.

BENIN

Section 8(7) protects "works of architecture, including both plans and models was well as the construction itself." No other special provisions are made for works of architecture.

BRAZIL

The Brazilian Copyright Act has no express provision for works of architecture, but, since Article 300(2) provides that they may be registered for copyright upon the deposit of "two perfectly clear photographs of the work," they are apparently regarded as "works of art."

BULGARIA

Bulgaria has one of the most extensive provisions of any Berne member country on architecture.[15] Article 1 of the decree on architecture states:

> Works of architecture regardless of their function as a creative synthesis of art, science and engineering shall be subject to copyright and protection in accordance with Article 2 of the Law on Copyright.

BURKINA FASO

Article 2(g) protects works of architecture. No other references to works of architecture are made.

CAMEROON

Section 2(viii) protects works of architecture. Section 22 provides:

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[15] See Decree No, 17, published in the Bulgarian Star Gazette of June 17, 1983.

> Subject to abiding by the legal provisions in force, works of art, including works of architecture permanently erected in public places may be reproduced and made available to the public by means of photography, cinematography or television.

CANADA

Bill C-60, which recently became effective in Canada, protects "architectural works of art," defined as "any building or structure or any model of a building or structure." [16] Significantly, this definition departs from that in the previous Act, which had required works of architecture to possess "an artistic character or design." [17] And, confirming their status as works of art and not works of applied art, architectural works are excluded from the exception to moral rights provided for useful articles. See Article 46(3).

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[16] These are treated as a special category within "artistic works."

[17] Case law had held, however, that this requirement was no more than the usual "originality requirement." See Hay v. Sloan, [1957] O.W.N. 445, 447 (High Court of Justice, Ontario).

Construction of a substantially similar building according to the plans is an infringement of the plans.[18] Infringement of the copyright in the work of architecture, however, must be by constructing a substantially similar work of architecture.[19]

CENTRAL AFRICAN REPUBLIC

Article 1 protects "works of architecture, including both plans and models and well as the construction itself." Article 15 provides:

> Reproduction with a view to cinematography, sound or television broadcasting or public communication of works of art and architecture permanently located in a public place or included in a film or broadcast in an accessory manner or that are merely incidental to the main subject, shall be lawful.

There are no other special provisions for works of architecture.

CHAD

Chad has no separate domestic copyright law. The provisions of French law and the Berne Convention govern copyright issues.

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[18] Fox The Canadian Law of Copyright and Industrial Designs 199 (2d ed. 1967).

[19] Id. at 200. For recent cases on works of architecture in Canada, see Geremia v. Maric, 17 CPR (3d) 433 (Fed. Ct. Trial Div. 1987)(injunction granted); Randall v. Harwood Homes Ltd., 17 CPR (3d) 372 (Manitoba Court of Queen's Bench 1987)(injunction granted); Bayliner Marine Corp. v. Doral Boats Ltd., 5 CPR (3d) 289 (Fed. Ct. Trial Division 1985)(boat not a work of architecture); Katz v. Cytrybaum, 76 CPR (2d) 276 (B.C. Ct. App. 1983)(owner of building could not give permission to use architect's drawings); ADI v. J.L. Destein, 68 CPR (2d) 262 (New Brunswick Court of Queen's Bench 1982); Kaffka v. Mountain Side Developments Ltd., 62 CPR (2d) 157 (B.C. S.Ct. 1982)(infringement of duplexes).

CHILE

Chile has no special provision for works of architecture, but since Article 43 provides the following exemption, they are obviously protected:

> The reproduction of works of architecture by mean of photographs, cinematography, television, and any other analogous process, as well as the publication of corresponding photographs in newspapers, magazines, and school textbooks, is free and is not subject to remuneration in respect of copyright.

See also Article 44 (providing a similar exemption for monuments and "artistic works that adorn public squares, avenues and places."

COLOMBIA

Article 2 protects works of architecture as "artistic works." A general exemption is provided in Article 40 for works that are permanently located in public places. Article 43 states:

> The creator of an architectural design may not prevent the owner from making alteration to it, but he shall have the right to prohibit his name from being associated with the altered work.

Article 199 establishes a deposit requirement for works of architecture consisting of a description of the work of architecture plus photographs which show "both frontal and lateral views."

CONGO

Article 7 protects "architectural works, including both plans and models as well as the construction itself." Article 33(4) provides the standard exemption for films and television broadcasts of works of architecture in public places.

COSTA RICA

Article 1 protects works of architecture. Article 71 provides a general standard exemption for photographs of works of art in public places but limits it to those works "acquired by the authorities."

IVORY COAST

Article 5 (viii) protects "works of architecture, including both the plans and models and the construction itself."

CZECHOSLOVAKIA

Article 2(1) protects works of architecture. Article 32 provides a standard exemption for the filming or broadcast of works of architecture permanently located in public places.

CYPRUS

Article 2 (1)'s definition of "artistic works" protected in Article 3(1)(d) includes, in subparagraph (e), "works of architecture in the form of buildings or models." "Building" is defined as "any structure." In the definition of "copy," it is provided that an architectural work can only be copied in another building.

DENMARK

Article 1 protects works of architecture. Article 11 grants a private use exemption for disseminated works but sensibly states that this does not permit the construction of an architectural work. Article 13 provides:

> Buildings may be altered by the owner without the consent of the author, for technical reasons or with a view to their particular utilization.

Article 25 states simply that "[p]ictures of buildings may be made freely."

EGYPT

Article 2 protects works of architecture. Article 46 states that infringing buildings may not be seized or demolished.

FIJI

In 1961, Fiji adopted the United Kingdom Act of 1956 with certain amendments. Section 3(1) of that Act protects "works of architecture, being either buildings or models for buildings."[20] Section 48 defines a "building" as including "any structure." Section 49(2) (a) provides that construction of a work of architecture does not constitute publication of "the work."

FINLAND

Article 1 protects works of architecture. Like the Danish statute, supra, there is a private use exemption that does not apply to works of architecture. See Article 11. An exemption is provided in Article 13 for unauthorized alterations "if considerations of a technical nature or reasons connected with their use so require." Article 25 states a "building may be freely reproduced in pictorial form."

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[20] British authorities are split on whether works of architecture were required to posses "artistic quality" to be protected under the 1956 Act. Compare Coppinger and Skone James on Copyright, 262 (11th ed. 1980) with Laddie, Prescott & Victoria, The Modern Law of Copyright 112-113 (1980).

FRANCE

Article 3 protect works of architecture. Publication consists of "the repeated execution of a plan or standard draft." Article 28. There are no other special provisions for works of architecture, a situation that has been criticized by one commentator, [21] since the French law provides extensive rights, including a high level of droit moral as well as a droit de suite. [22] There have, however, been very few cases under the French Copyright Act. [23]

GABON

There is no separate Copyright Act in Gabon. Instead, the Brussels text of Berne is self-executing.

GERMAN DEMOCRATIC REPUBLIC

Article 2(1) protects "architectural works." There are no other special provisions for these works.

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[21] See Hellmuth, Obsolescence Ab Initio: The New Act and Architectural Copyright, 22 Bull. Copr. Soc'y 169, 185-187 (1975).

[22] But cf. Duchemin, Droit due Suite for Artists, 62 R.I.D.A. 78, 104 (1969), which questions whether works of architecture are entitled to droit de suite in France.

[23] For a discussion of these cases and for a general review of French protection of architecture, see Huet, Architecture and Copyright, 58 R.I.D.A. 3 (1976).

GERMANY (FEDERAL REPUBLIC OF)

In the German Copyright Act of 1965, Article 2(4) protected "artistic works, including architectural works and works of applied art and plans and sketches of such works." A unique view of publication was taken in Article 6(2), which provided that an artistic work is published "if, with the consent of the copyright owner, the original or a copy of the work is made permanently accessible to the public."

Article 23 gave authors a general right to prohibit adaptations and "other transformations," and added that this applied to "copies of an architectural work." On the other hand, architectural works are excluded from the droit de suite. Article 26(8). Article 22 established an exemption with respect to all artistic works and photographs for "transpositions into different scale and other new directions...to the extent required by the method of reproduction," a provision that at least facially applied to architectural works.

Although a general right of impoundment and a right of destruction of infringing works were provided in Articles 98 and 99, architectural works were denied those rights. See Article 101(2).

In 1974, an act concerning works of art and photography was passed. Part I Sec. 1 of this act states: "Authors of works of art and photography shall be protected in accordance with this Act." Sec. 2 states: "Works of art shall include products of the industrial arts and architectural works of an artistic character."

Execution of works of architecture may be authorized only by the author and not by his or her legal representative, (Article 14). In addition to unauthorized copying, imitation (Nachbildung) of architectural works and plans is considered infringement. (Article 15). Yet, if "an original work" is created by a third party, "free use" is permitted (Article 16). Reproduction for personal use "other than by means of building" is also allowed. (Article 18). A standard exemption for photographs, drawings, and paintings of works of architecture permanently located in public places is permitted, limited, however, to reproduction of the exterior of the work. (Article 20; see also Article 21).

Finally, authors of architectural works may not have infringing buildings destroyed. (Article 57).

GREECE

The Greek Copyright Act does not make express provision for works of architecture.

GUINEA

Article 1(vii) protects "architectural works, including both plans and models and the building itself." There are no other special provisions for works of architecture, although it is possible they may qualify for droit de suite under Article 24 as "three-dimensional works."

HOLY SEE

The Vatican incorporates Italian copyright law

> provided such provisions are 'in no way contrary to the precepts of divine law, nor to the general principles of common law, nor to the tenor of the Treaty and Concordat concluded between the Holy See

> and the Italian State on February 11, 1929... .[24]

As noted below in our discussion of Italian law, Italy protects work of architecture.

HUNGARY

Article 4(1) of the 1969 Hungarian Copyright Act vests copyright "in the person who has created the work (the author)." Works of architecture are specially covered in Chapter X. Article 44(1) vests copyright in architectural works in the author of the design who, in subparagraph (2) is given the right to have his or her name "indicated on the building (construction)...." Articles 44(3) and 45 contain standard exemptions for the photography of works of architecture located permanently in public places.

A December 29, 1969 decree, amended on July 12, 1983, implements provisions of the Copyright Act. Article 1 of the decree states that "works of architecture, building complexes and town planning projects" as well as "projects for technical structures" are protected. Article 32 of the decree (implementing Article 44(1)) of the Copyright Act contains the following provisions:

> (a) The Copyright Act shall protect, as being creations of the authors, projects for architectural works or technical structures, including standard architectural projects, if they may be described as artistic or scientific creations; other projects shall be

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[24] State of the Vatican City - No. XII, Copyright Law, January 12, 1960.

protected in accordance with Article 51 of
the Copyright Act.[25]

ICELAND

Article 1 protects "works of architecture." Article 11 provides a private use exemption for a single copy but excludes "the construction of architectural works which are protected under the rules governing architectural works...."

Article 13 permits the owner of the physical architectural structure to "alter it without the consent of the author, in so far as this may be considered necessary for its practical utilization, or for technical reasons." Article 16 contains the standard exemption for the taking of photographs or works of architecture in public places, but with the following qualification: if the work of architecture "constitutes the chief motif of a picture which is used for commercial purposes, then the author shall be entitled to remuneration...."

INDIA

Chapter 1, Paragraph 2(c) (ii) includes "an architectural work of art" within the category of "artistic works." An "architectural work of art" is defined in subparagraph 2(b) as "any building or structure having an artistic character or design, or any model for such building or structure." Article 13(5) adds that copyright in architectural works "shall subsist only in the artistic character and design and shall not extend to processes or methods of construction."

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[25] See also Subparagraph (2) of Article 44, which discusses technical creations.

Publication is not defined in the case of architectural works, but does not include "the issue of photographs and engravings" of such works. Article 3(c) (ii). Articles 52(s) and (x) contain the standard exemptions for photographs, drawings, paintings and inclusion of works of architecture in films.[26]

Article 52(x) allows:

> the reconstruction of a building or structure in accordance with the architectural drawings or plans by reference to which the building or structure was originally constructed: Provided that the original construction was made with the consent or licence of the owner of the copyright in such drawings and plans.

Article 59(1) puts special limitations on the remedies copyright owners of works of architecture may obtain:

> Where the construction of a building or other structure which infringes or which, if completed would infringe the copyright in some other work has been commenced, the owner of the copyright shall not be entitled to obtain an injunction or to restrain the construction of such building or structure to order its demolition.[27]

IRELAND

Article 9(1) (b) includes "works of architecture, being either building or models for buildings" as protected "artistic works." "Buildings" are defined in Article 2(1) as including "any structure." Article 2(1) also defines "reproduction" in the case of artistic works as including:

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[26] See also id., subparagraph (a) which permits the two dimensional reproduction of three dimensional works so long as "the object would not appear to persons who are not experts in relation to objects of the description, to be a reproduction of the artistic work."

[27] See also Article 59(2) which exempts infringing architectural works from the demolition provisions of Article 58.

> a version produced by converting the work into three-dimensional form, or, if it is in three dimensions, by converting it into a two-dimensional form....[28]

Publication of works of architecture is not defined, but does not include construction of the work or the issuance of photographs or engravings thereof. Article 3(2) (a). Article 12(3) (b) provides the standard exemption for reproductions of works of architecture located in public places. Articles 14(9) and (10) permit reconstruction of the building and reference to the original plans for such reconstruction.

Articles 22(a) and (b) provide that no injunction shall issue against the construction of an infringing building after construction has begun and that no order for demolition may be issued.

ISRAEL

Israel incorporates the United Kingdom Copyright Act of 1911, as modified. Article 35 of that Act protects "architectural works of art," defined as:

> [A]ny building or structure having an artistic character or design, in respect of such character or design, or any model for such building or structure, provided that the protection afforded by this Act shall be confined to the artistic character and design, and shall be confined to the artistic character and design, and shall not extend to processes or methods of construction.

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[28] Article 14(7).

Article 2 provides an exemption for the two dimensional reproduction of works of architecture located in public places. Article 9(1) prohibits the issuance of injunctions against further construction of infringing buildings, as well as barring demolition of completed infringing buildings.

ITALY

Article 2(5) of the Italian Copyright Statue protects "architectural plans and works."[29] Article 20 makes clear that this encompasses architectural structures by providing:

> [I]n the case of works of architecture, the author may not oppose modifications found necessary in the course of construction. He may not, moreover, oppose other modifications which may be necessary in such completed work. However, if the work is recognized by the competent state authority as having an important artistic character, the author shall be entrusted with the study and execution of such modifications.

Works of architecture are not granted a droit de suite. See Article 144.

JAPAN

Article 10(1) (v) protects architectural works. Article 2 (xv) (b) states that "in the case of architectural works," the right of reproduction "includes the construction of an architectural work according to its plans." Article 4(1) provides that an architectural work may be "made public" when it has been constructed with the consent of the author.

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[29] *See also* Article 99 which concern rights of authors of engineering projects.

Article 20(2) (ii) is an exemption from the author's right of integrity permitting "modification of an architectural work by means of extension, rebuilding, repairing or remodelling." Article 46 is the standard privilege to reproduce works of architecture located in public places, with the following relevant exceptions: "imitative reproduction of an architectural work," and, reproduction "exclusively for the purpose of selling...copies."

LEBANON

Article 138 of the Lebanese Regulation of Commercial and Industrial Property Rights broadly protects "all works manifesting human intelligence, whether written, plastic, graphic or oral," but does not specifically enumerate works of architecture. Architectural works are, however, expressly covered in Chapter VII of the Penal Code,[30] see Article 722.

LIBERIA

Article 2.1(c)(9) provides that the term "literary, scientific or artistic work" includes architectural works, designs and models.

LIBYA

Article 2 protects works of architecture. There are no other references to architectural works.

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[30] "All productions of the human intellect, whatever their merit, are deemed to be literary or artistic works...and which are expressed...by the working of physical substances, such as architecture..."

LIECHTENSTEIN

Article 1 protects works of architecture. Article 14 gives the copyright owner of architectural plans the right to "carry out such plans." Article 22 contains a private use exemption but excludes works or architecture. On the other hand, Article 54 provides: "Buildings (construction) may not be the object of conservatory service, nor may they be confiscated."

LUXEMBOURG

Article 1 protects works of architecture. Article 21 provides the standard exemptions for works of architecture permanently situated in public places.

MADAGASCAR

Article 3 protects works of architecture.

MALI

Article 7(vii) protect "architectural works, including both plans and models and the building itself." Article 35 provides that while "[t]he author of a work of architecture may not prevent any alterations that the owner may decide to make ... he may object to the mentioning of his name as being the author of the project."

MALTA

Article 2 protects "works of architecture in the form of buildings or models" as "artistic works." "Buildings" are defined in the same article as including "any structure."

Article 7 (1) (c) provides the usual exemption for artistic works located in public places. Article 7 (2) states:

> Copyright in a work of architecture shall also include the exclusive right to control the erection of any building which reproduces the whole or a substantial part of the work either in its original form or in any form recognizably derived from the original: Provided that the copyright in any such work shall not include the right to control the reconstruction, in the same style as the original, of a building to which that copyright relates.

MAURITANIA

The Brussels text of Berne is self-executing in Mauritania.

MAURITIUS

Article 2(i) provides that "artistic, literary, or scientific work" includes works of architecture.

MEXICO

Article 7(h) protects "architectural works." Article 18(c) contains an exemption for "publications" of works of architecture that are visible from public places. No other special provisions for works of architecture are contained in the Act.

MONACO

Article 2 protects works of architecture. Article 34 provides that construction of a work of architecture does not constitute publication.

MOROCCO

Article 6(7) protects works of architecture. Article 20 provides the standard exemptions for works of architecture permanently located in a public place.

NETHERLANDS

Article 10 (vi) protects works of architecture. However, elements of architectural design that are functionally required are not protectible under the Copyright Act. [31] Article 18 allows the reproduction or publication of a reproduction of the exterior of a work of architecture occurs if the work is permanently displayed in a public thoroughfare, but this does not include such reproduction if the work of architecture is the principal focus of the reproduction, nor reconstruction of the building. [32] Similarly, Article 23 permits the owner of the physical building to reproduce it in a catalogue for the purpose of sale.

The Netherlands has an Architect's Council that is permitted to receive and take action on complaints against registered architects. In the period 1957-1982, only thirteen complaints were received. [33]

NEW ZEALAND

Article 2 protects "works of architecture, being either buildings, or models for building" as "artistic works." "Buildings" are defined in the same article as including "any structure." "Construction" is defined as including "erection; and any references to reconstruction shall be construed accordingly." Supplementary provisions state, in paragraph 2(d) (ii), that publication does not include construction of a work of architecture or the issuance of photographs or engravings thereof. Articles 20 (3), (4), and (5) contain the standard exemptions for two dimensional reproductions of works of architecture permanently located in public places. Subparagraph 10 of Article 20 permits reconstruction of the building and reference to the original plans for the reconstruction. Articles 24(4) (a) and (b) contain the standard bars on injunctions against construction of a building partially completed, and, against demolition.

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[31] Verkade & Spoor, Autuersrecht 71.

[32] Pfeffer, Gebrandy, Kort Commentar op de Auteurswet 1912, 182-183 (1973).

[33] See de By, Of Building and Borrowing: Functionalism and th Protection of Structures, unpublished manuscript, Columbia University Law School.

NIGER

The Paris Act of 1971 is self-executing in Niger.

NORWAY

Article 1(7) protects "architectural works, drawings, and models as well as the building itself." Article 11 provides a single copy private use exemption but excludes from it "the right to copy an architectural work, through the construction of a building." Article 12 permits owners of buildings to alter the work "for technical reasons or in order to enhance their utility." Article 23 allows buildings to be "freely reproduced in pictorial form."

While Article 56 provides that an infringing building may not be demolished, the copyright owner of the work of architecture "may in given circumstances demand alteration of the building, compensation or redress."

PAKISTAN

Article 2(c) protects "architectural works of art" as "artistic works." An "architectural work of art" is defined in paragraph (b) as "any building or structure having an artistic character or design, or any model for such building or structure." Article 10(5) adds that, in the case of architectural works, "copyright shall subsist only in the artistic character and design and shall not extend to the processes or methods of construction."

Article 4(c) (1) provides that the issuance of photographs or engravings of an architectural work does not constitute publication. Articles 57(1) (s) and (t) contain the usual exemptions for two-dimensional reproductions of architectural works permanently located in public places. Article 57 (w) permits reconstruction of the building.

Articles 64 and 65 prohibit injunctions against the construction and seizure of infringing buildings. Additionally, Article 66 excludes infringement of a building from the penal provisions.

PERU

Peru's Copyright Act does not expressly include works of architecture within the (non-exclusive) list of protected subject matter; however, since Article 72 contains an exemption for their reproduction by means of photography, cinematography, television and "any other analogous processes," they must be protected. See also Article 74.

PHILIPPINES

Article 2(g) protects works of architecture. There are no other references to regarding works of architecture.

POLAND

The Polish Act does not expressly include works of architecture with the class of protected works, but they appear to be included within the category of "fine arts," since Articles 20(5) and (6) provide that "in the domain of fine art, any person may reproduce architectural works, except for building purposes," and, may "[e]rect buildings according to plans published for general use."

PORTUGAL

Portugal has, perhaps, the strongest provisions for works of architecture. Works of architecture are protected in Article 1(1) (g). Article 25 contains the following unusual provision: "The creator of the global concept and the relevant project shall be the author of a work of architecture, town planning or design."[34] Article 60 also contains an unusual provision:

> (1) The author of an architectural project shall have the right to supervise the construction in all its stages and details, so as to ensure the conformity of the work and project.
>
> (2) When a work is executed according to a project, the proprietor of the work may not, either during or after building, introduce any alterations without previously consulting the project's author, under penalty of compensation for damages.
>
> (3) In the absence of agreement, the author may repudiate authorship of the modified work, and the proprietor shall not

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[34] See also Article 161(1), which requires that each copy of such study "shall indicate legibly the corresponding author, together with the site of construction of architectural works."

> thereafter be permitted to use the name of the author of the original project for his personal profit.

Article 68(2) (j) gives the author of an architectural work the right to construct the work "according to a plan, whether or not it is a repetition."[35]

ROMANIA

Article 9 protects architectural works of architecture.[36]

RWANDA

Article 2(g) protects works of architecture. Article 3 protects works of folklore generally. Paragraph (b) thereof interestingly extends this to "architectural styles." Article 11 provides for droit de suite but excludes works of architecture. Article 18(4) permits the standard two-dimensional reproduction of works of architecture permanently located in public places as well as allowing owners of buildings to make any modifications he or she desires to the building; however, in such event, the author "may oppose the use of his name as the author of the modifications."

SENEGAL

Article 1(vii) protects "architectural works, including both plans and models and the building itself." Article 14 provides the usual public place exemption.

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[35] See also Article 161(2) which states that repetition of an architectural work according to the same plans is subject to the author's agreement.

[36] Cf. Articles 14(f) and (g) for exemptions for works of plastic arts.

SOUTH AFRICA

Article 1(b) protects "works of architecture, being either buildings or models for buildings" as "artistic works." "Buildings" are defined as including "any structure." "Construction" is defined as including "erection; and reference to reconstruction shall be construed accordingly." Article 10(6) provides that reconstruction or reference to the original plans for reconstruction is not an infringement. Articles 10(2) and (4) provide the usual public place exemptions. Article 18(4) provides the standard bar on injunctions and demolition.

SPAIN

Spain's Copyright Act and Regulations do not expressly include works of architecture as a separate category of protected work.

SRI LANKA

Article 7(g) protects works of architecture. All works are protected "irrespective of their quality and the purpose for which they are created." There are no other special provisions regarding works of architecture.

SURINAME

The 1971 Paris text of Berne is self-executing in Suriname.

SWEDEN

Article 1 protects works of architecture. Article 13 allows the owner of the physical buildings to alter them without the author's permission. Article 25 provides that a building may be "freely reproduced in pictorial form."

SWITZERLAND

Article 1 protects works of architecture. Article 14 states in relevant part: "The exclusive right to reproduce... the plans of architecture...include also the right to carry out such plans."

While Article 30(g) (3) permits photographing of architectural works permanently located in public places, it also states that "it shall be unlawful to build a structure reproducing a work or architecture." Article 55, however, bars demolition of a infringing building.

THAILAND

Thailand has one of the most detailed definitions of works of architecture, protecting in Article 4(4) works of architecture. A "work of architecture" is defined as:

> A design of a building or construction, an interior or exterior decoration as well as a decoration of the surrounding of a building or construction, or the creation of a model of building or construction.

Article 36 provides the standard public place exemption, Article 39 permits restoration of the building without the author's consent.

TOGO

The 1971 Paris text of the Berne Convention is self-executing in Togo.

TRINIDAD AND TOBAGO

No information is available on the copyright laws of Trinidad and Tobago.

TUNISIA

Article 1(7) protects "architectural works, designs and models, as well as the building itself." Article 14 provides the usual public place exemption. [37]

TURKEY

Article 4(3) protects works of architecture. Article 67(2) permits the owner of a building to make restorations without the author's consent.

UNITED KINGDOM

Article 4(1) (b) protects, within the class of "artistic works," "works of or a model for a building." A "building" is defined in paragraph (2) as including "any fixed structure, and a part of a building or fixed structure." Article 17(3) states:

> In relation to an artistic work, copying includes the making of a copy in three dimensions of a two-dimensional work and the making of a copy in two dimensions of a three-dimensional work.

This is qualified, however, in Articles 59(1) and (2), which provide, in the case of buildings, that copyright in such works is not infringed by:

> (a) making a graphic work representing it;
> (b) making a photograph or film of it; or
> (c) broadcasting or including it in a

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[37] For recent articles on the status of architects and works of architecture in Tunisia, see Mezghani, Letter from Tunisia, COPYRIGHT, April 1988 at p. 227-228; Mezghani, Le Statut Juridique de l 'architecte en Tunise, Revue Tunisienne De droit (R.T.D.) 1986.

> cable programme service a visual image of it.

Article 62 permits reconstruction of the building without permission of the owner of copyright.

Articles 73(4) (c) and (5) provide moral rights to the author of the work of architecture to be so identified. Article 76(4) (c) (i) provides that the rights of the author of a work of architecture in the form of a model is infringed by distribution of copies of "a graphic representing, or of a photograph of a derogatory treatment of the work." Article 76(5) adds that, while Article 76(4) does not apply to works of architecture in the form of the building, the author thereof can demand that his or her name be removed if the work is the subject of derogatory treatment.

Article 165(3), in a departure from most other Berne member statutes,[38] provides:

> In the case of a work of architecture in the form of a building; or an artistic work incorporated in a building, construction of the building shall be treated as equivalent to publication of the work.

Paragraph (4) (b) (ii) provides, however, that copies of a graphic work representing or of photographs of a work of architecture in the form of a building, does not constitute publication. The definition of work of architecture contains the definition found in Article 3(1) of the 1956 Act, which similarly drew a distinction between photographs, sculptures and the like which were protected "irrespective of artistic quality," and, works of architecture, which had no such stipulation regarding artistic quality.

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[38] But cf. Japan and Federal Republic of Germany.

British authorities are split on whether this indicated works of architecture were required to possess "artistic quality" to be protected. [39]

URUGUAY

Article 5 protects works of architecture. Article 44(C)(2) permits the copying or reproduction of architectural plans, facades or projects without the consent of the author.

VENEZUELA

Works of architecture are protected in Article 1. Without regard to artistic character, Article 21 however, provides:

> The author of works of architecture, cannot oppose modifications that become necessary during construction, or subsequent thereto. However, if the work has a special artistic character, the author shall be given preference in connection with the study and realisation of these modifications.

Article 44(3) provides the standard public place exception, limited, however, to reproduction of the facade.

YUGOSLAVIA

Article 3 protect work of architecture, "whatever may be the material of which they are made." Article 40 provides a droit de suite, but excludes works of architecture. Articles 48(4) and (5) and Article 49(5) provide the standard public place exemptions.

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[39] Cf. Coppinger and Skone James on Copyright 262 (12 ed. 1980) with Laddie, Prescott, & Vitoria, The Modern Law of Copyright 112-113 (1980).

For cases under prior British statutes, see Chabot v. Davies [1936] 3 All. E.R. 220 (copyright in plans for a shop were infringed by construction of shop); Meikle v. Mauge, [1941] 3 All. E.R. 144 (infringement of building by other building); Blair v. Topkins and Osborne, [1971] 1 All. E.R. 468 (after architect completed plans and client paid for them, client built structure himself. Court found there was an implied license to do so); Stovins-Bradford v. Volpoint Properties, Ltd., [1971] 3 All. E.R. 570 (distinguishing Blair and finding no implied license).

ZAIRE

The 1971 Paris text of Berne is self-executing in Zaire.

ZIMBABWE

The 1971 Paris text of Berne is self-executing in Zimbabwe.

CHAPTER 7. ANALYSIS AND CONCLUSIONS

A. ANALYSIS

1. Comments Submitted in Response to Notice of Inquiry.

On June 8, 1988, the Copyright Office published a Notice of Inquiry in the Federal Register soliciting comments on a broad range of issues regarding works of architecture and works related to architecture.[1] The Office received ten comments and one reply comment. Commentators included architects, engineers, the American Institute of Architects (AIA), the Frank Lloyd Wright Foundation, an information industry trade association, a computer company, a law professor, and law firms representing architects, contractors, and owners of buildings.

Few commented on all the issues raised in the Notice of Inquiry. Of the nine commentators who commented on whether the copyright law protects conceptually separable pictorial, graphic, or sculptural elements embodied in architectural structures, seven answered affirmatively. The Office received only two negative comments on the question. One came from a solo architect who thought that, while one architect is not justified in copying another architect's work too closely, it would be difficult to determine how close is "too close," and, in any event, architects "often refer to aspects of other buildings to verify their ideas. The use of precedent is necessary and commonplace."

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[1] 53 Federal Reg. 21536-21538 (June 8, 1988).

The other negative response came from the American Institute of Architects, which noted that, notwithstanding its opposition as a professional association, a number of its members were in favor of copyright protection for works of architecture. The AIA did not articulate the basis for its nonsupport for these members' position. [2] However, in meetings with the AIA representatives, Copyright Office staff were informed that part of the basis for the AIA's position was the willingness, even wish, of some architects to have their works copied.[3]

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[2] But see informal opinion of Dale R. Ellickson, Esq., AIA Senior Director, Documents Program, reproduced in U.S. Adherence to the Berne Convention: Hearings before the Subcommittee on Patents, Copyrights and Trademarks, Senate Judiciary Comm., 99th Cong., 1st & 2d Sess. 732-734 (1985 & 1986).

[3] The contexts and some possible limits of this view are discussed in a leading treatise:

> Design professionals vary in their attitude toward the importance of legal protection for their work. Some design professionals want their work imitated. Imitation may manifest professional respect and approval of work. When credit is given to the original, imitation may also enhance the professional reputation of the person whose work is copied. Some design professionals are messianic about their design ideas and would be distressed if their work were not copied. Many design professionals believe that free exchange and use of architectural and engineering technology are essential.
>
> Even design professionals who want imitation or who do not object to it draw some lines. Some design success is predicated upon exclusivity. Copying the exterior feature and layout of a luxury residence or putting up an identical structure in the same neighborhood is not likely to please the architect or client. The same design professional who would want his [or her] ideas to become known and used might resent someone going to a public agency and without authorization copying construction documents required to be filed there.
>
> This same design professional is likely to be equally

The AIA did, however, propose that Congress amend the Copyright Act to provide the copyright owner of plans and specifications the exclusive right to execute those plans and specifications in a structure. This right would include the remedy of demolition of infringing buildings. The right would not prohibit, though, construction of a substantially similar building derived from "measured drawings" -- i.e., drawings made solely by observation or by surveying an existing building's exterior and/or interior.

The AIA proposal is based on a premise that the principal value of plans is in their execution, and that current law does not adequately protect that value, since most decisions have held copyright in the plans does not extend to the right to execute them in a structure. [4] Congress may decide that protection of this value satisfies an important public purpose. While not taking a position on the AIA proposal at this time, we express our concern that the right would, as applied to typical tract houses and other

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> distressed if a contractor were to copy plans made available for the limited purpose of making a bid. Much depends upon what is copied, who does the copying, and whether the appropriate credit is given to the originator.

Sweet, Legal Aspects of Architecture: Engineering and Construction Services 400-401 (3d ed. 1985).

[4] See generally, Chapter 3, above. Some courts have, however, based awards for infringement of plans on the defendants' profits on the sales of the houses depicted in the plans -- a significant disincentive for future infringement. Some commentators have also suggested that under 17 U.S.C. {113(a)(1978), protection along the lines proposed by the AIA is currently available. Others, citing Section 113(b), argue that protection is not currently available. The cases reviewed in Chapter 3 generally support the latter view.

standard structures, indirectly provide copyright protection that could not be obtained directly. [5]

The reasons given by the commentators for supporting copyright in architectural works may be summarized as follows:

1. Architecture is a traditional fine art and possesses as much artistic expression as other fine arts. Accordingly, works of architecture should be granted the same rights as these other arts.

2. Granting copyright protection to works of architecture would encourage the creation of new designs, benefitting both architects and the public. Currently, some architects do not make their unexecuted designs public because of fear they will not be able to prevent others from constructing the building depicted in the plans. Copyright protection for the design elements of the building would thus result in greater public dissemination of unexecuted designs.

3. The Berne Convention, to which the United States adhered on March 1, 1989, requires protection of works of architecture.

4. Trademark and design patent protection are generally unavailable.

5. Contract protection is inadequate because it does not reach third parties, and because frequently drawings and sketches are provided before contractual arrangements are entered into.

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[5] AIA might reply that since the proposed right would apply only to circumstances where the plans are copied, only a new (and necessary) remedy for works (plans) that are currently subject to protection would be established. We recognize the merits in this argument.

2. The Nature and Scope of Existing Law.

a. The Case Law.

In Chapter 3, we reviewed state and federal decisions on architectural works. We noted decisions indicating that copyright in architectural plans and drawings does not extend to the structure depicted therein, as well as dicta in a number of decisions to the effect that "buildings" are not subject to copyright protection. Some few cases, however, have enjoined construction of buildings derived from infringing plans, and some few state decisions (mostly older ones) can be read as indicating protection would be available for the structure but for a general divestitive publication. These decisions can, though, hardly be said to constitute a substantial or well-developed body of case law.

The focus of much reported litigation has centered around standard private dwellings and commercial buildings. We were unable to find a single decision in which a claim was adjudicated for a work of architecture which is, self-conscious artistic expression of a high order, such as the Guggenheim Museum. Whether the application of the 1976 Copyright Act to architectural works having obvious, perhaps even predominantly, aesthetic features dictating overall appearance will result in protection so far denied to commonplace structures remains to be seen.

The courts' reluctance to extend copyright in architectural plans and drawings to include execution of the structure depicted therein appears to have been based on two factors: first, a fear of indirectly granting exclusive rights to noncopyrightable subject matter, possibly harming competition and increasing housing costs; and, second, an interpretation of the Supreme Court's 1879 opinion in Baker v. Selden as barring such a right.[6]

Baker v. Selden is one of a handful of seminal copyright decisions dealing with fundamental and longstanding limitations on the subject matter and scope of rights under copyright. The case essentially found the Supreme Court rejecting efforts to extend a copyright in a literary work which described a system of accounting to the system itself. In the process, the Court -- in its ruling and in dicta -- articulated a distinction between protectible expression and unprotectible ideas, systems and methods which remains vital in contemporary litigation and in 17 U.S.C. 102(b).

Baker involved a suit over a book that exhibited and explained Selden's method of book-keeping. The book consisted of an introductory essay explaining the book-keeping system, as well as certain blank forms illustrating the system. Baker's system was similar to Selden's only in the mathematical results it obtained -- the actual forms were not substantially similar, [7] a point of considerable importance, since Selden claimed he possessed a copyright in the system itself, and that the system could not be used without creating substantially similar forms. Given that the Supreme Court found Baker's forms were not substantially similar, the case could have been dismissed on this basis.

The Supreme Court, however, met Selden's claim head-on in far-reaching dicta. The Court began with what it termed a self-evident proposition: that "there is a clear distinction between the book, as such, and the art which it is intended to illustrate."[8] Thus, a book on pharmacology would, obviously, not restrict the manufacture of medicines discussed therein. Protection for the "art" discussed in such books is, the court noted, within the province of patents, not copyrights. "The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains."[9]

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[6] 101 U.S. 99 (1879).

[7] It was not alleged that Baker copied from Selden's essay.

There can be no quarrel with these generalities. Copyright protects the expression of ideas, and not the ideas themselves; it protects the expression of a method or system and not the method or system. The Court, however, reached beyond this well-established ground, and stated:

> Where the art it [a book] teaches cannot be used without employing the methods and diagrams used to illustrate the book, or such as are similar to them, such methods and diagrams are to be considered as necessary incidents to the art, and given therewith to the public; not given for the purpose of publication in other works explanatory of the art, but for the purpose of practical application.[10]

Although courts in cases involving claims in architectural plans cite the above passage from Baker v. Selden, they have not cited the next passage in the opinion:

> Of course, these observations are not intended to apply to ornamental designs.... Of these it may be said, that their form is their essence, and their object, the production of pleasure in their contemplation. This is their final end. They are as much the product of genius and the result of composition, as

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[8] 101 U.S. at 102.

[9] Id. at 103.

[10] Id. at 103.

> are the lines of the poet or the historian's periods.[11]

The Notice of Inquiry asked for comment on the effect, if any, of Baker v. Selden on protection of works of architecture. Four commentators responded to this question.[12] All agreed that Baker v. Selden in no way restricted protection for these works as a class.

b. The Statute and Its Legislative History.

The Copyright Act does not include works of architecture as a separate class of protected subject matter in Section 102(a). The copyrightability of works of architecture or parts thereof depends upon whether such material comes within the class of pictorial, graphic or sculptural work (principally the latter) under Section 102(a)(5). The definition of "pictorial, graphic, and sculptural works" in the 1976 Copyright Act states that it includes "three-dimensional works of fine, graphic, and applied art," and that such works shall

> include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.

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[11] Id. at 103, 104.

[12] See Comment #3 at p.2; Comment #5 at p.11-12; Comment #6 at p.5; Comment #11 at 2-3. Professor Nimmer has written that: "It is noteworthy that in Mazer v. Stein the Supreme Court interpreted Baker v. Selden as merely holding that the copying of an idea without copying the expression of the idea...does not constitute an infringement." 1 Nimmer on Copyright Sec. 2.18[D] (1989).

Nonmonumental works of architecture[13] are, concededly, "useful articles," [14] and thus the question is whether the structure itself contains any sculptural features that are "capable of existing independently of" the utilitarian aspects of the architectural structure. The House Report accompanying the 1976 Copyright Act discussed the issue of copyright in works of architecture:

> A special situation is presented by architectural works. An architect's plans and drawings would, of course, be protected by copyright, but the extent to which that protection would extend to the structure depicted would depend upon the circumstances. Purely nonfunctional or monumental structures would be subject to full copyright protection under the bill, and the same would be true of artistic sculpture or decorative ornamentation or embellishment added to a structure. On the other hand, where the only elements of shape in an architectural design are conceptually inseparable from the utilitarian aspects of the structure, copyright protection for the design would not be available. [15]

We interpret this passage as follows:

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[13] The copyright statute does not distinguish between monumental and nonmonumental works of art or architecture. To the extent there is a distinction important to copyrightability, it arises from the language of the House Report on the 1976 Copyright Act, quoted infra, at 8.

[14] See 17 U.S.C. Sec. 101 (1978) (definition of "useful article"): "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information." Buildings may obviously be utilitarian structures in the plain sense of having a purpose to provide shelter. Much hinges, however, upon how the word "intrinsically" is to be understood for purposes of defining a utilitarian article and, if an article is properly utilitarian, how the test of conceptual separability should be applied. Congress did not explain which of the meanings of "intrinsic" it intended to have applied in this area, i.e., did it intend the Copyright Office and the courts to look to the "real nature of the article," its "inherent or true" value or character -- given that we are dealing necessarily with articles with mixed characteristics.

[15] H.R. REP. NO. 1476, 94th Cong., 2d Sess. 55 (1976).

1. Architectural plans and drawings are protected without the need for a separability analysis;
2. Protection for architectural structures is available under the following circumstances:
    a. Purely nonfunctional or monumental structures are protected without the need for a separability analysis;
    b. Artistic sculpture or decorative embellishment added to a structure is (generally) protected under a separability test.

3. Conceptual Separability.

The Copyright Office is statutorily obligated to issue certificates of registration for claims to copyright if the Register "determines that, in accordance with the provisions of this title, the material deposited constitutes copyrightable subject matter and that the other legal and formal requirements of this title have been met... ." [16] The Copyright Act, however, provides only minimal guidelines by which to make such evaluations. Section 102(a) limits protection to "original works of authorship." The 1976 House Report states:

> The phrase "original works of authorship," which is purposely left undefined, is intended to incorporate without change the standard of originality established by the courts under the present copyright statute. This standard does not include requirements of novelty, ingenuity, or esthetic merit, and there is no intention to enlarge the standard of copyright protection to require them. [17]

In the past, the courts have determined copyrightability of pictorial, graphic, and sculptural works embodied in useful articles according to the language of the Act, prior decisions, and Copyright Office regulations.[18] This practice has continued under the 1976 Act, but not without some disagreement among distinguished jurists regarding what the appropriate standard is. Nowhere is this disagreement better illustrated than in the Second Circuit, where three recent decisions approach the issue from different perspectives, and each has thoughtful dissents.[19]

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[16] 17 U.S.C. Sec. 410(a)(1978).

[17] H.R. Rep. 1476 at 51.

Other courts have adopted different approaches from those found in the Second Circuit.[20] In Esquire v. Ringer,[21] the Court of Appeals for the District of Columbia raised the issue of whether or not the Copyright Office had correctly interpreted its own regulation, 37 CFR 202.10(c)(1959, repealed 1978), in rejecting a claim for certain abstract outdoor lighting fixtures. In reversing the district court, the Court of Appeals found that the Register had "adopted a reasonable and well-supported interpretation of Sec. 202.10(c),"[22] and that the regulation was properly applied to Esquire's claims. As noted by the Court of Appeals, "[t]he Register's interpretation

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[18] See Carol Barnhart, Inc. v. Economy Cover Corp., 773 F.2d 411 (2d Cir. 1985).

[19] Cf. Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989 (2d Cir. 1980); Carol Barnhart, Inc. v. Economy Cover Corp., 773 F.2d 411 (2d Cir. 1985); Brandir Int'l v. Cascade Pacific Lumber Co., 834 F.2d 1142 (2d Cir. 1987).

[20] Esquire v. Ringer, 591 F.2d 796 (D.C. Cir. 1978), cert. denied, 440 U.S. 908 (1979). Cf. Norris Indus., Inc. v. International Telephone & Telegraph Corp., 696 F.2d 918 (11th Cir.), cert. denied, 464 U.S. 818 (1983); Poe v. Missing Persons, 745 F.2d 1238 (9th Cir. 1984), and the Second Circuit cases cited in the previous footnote.

[21] 591 F.2d 796 (D.C. Cir. 1978), cert. denied, 440 U.S. 908 (1979).

[22] Id. at 800.

... derives from the principle that industrial designs are not eligible for copyright." [23] In the Register's view:

> registration of the overall shape or configuration of utilitarian articles would lead to widespread copyright protection for industrial designs. The Register reasons that aesthetic considerations enter into the design of most useful objects. Thus, if overall shape or configuration can qualify as a "work of art," "the whole realm of consumer products--garments, toasters, refrigerators, furniture, bath tubs, automobiles, etc. -- and industrial products designed to have aesthetic appeal--subway cars, computers, photocopying machines, typewriters, adding machines, etc. -- must also qualify as works of art." [24]

Although the case was decided under the 1909 Act, the Court of Appeals reviewed the legislative history of the 1976 Act, and found that it further supported the Register's position. [25]

Compendium II of Copyright Office Practices, a manual "intended primarily for the use of staff of the Copyright Office as a general guide to its examining and related practices," states:

> Conceptual separability means that the pictorial, graphic, or sculptural features, while physically inseparable by ordinary means from the utilitarian item, are nevertheless clearly recognizable as a pictorial, graphic, or sculptural work which can be visualized on paper, for example, or as free-standing sculpture, as another example, independent of the shape of the useful article, i.e., the artistic features can be imagined separately and independently from the useful article without destroying the basic shape of the useful article. The artistic features and the

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[23] Id. at 800.

[24] Id. at 801.

[25] Id. at 802, 803.

> useful article could both exist side by side and be perceived as fully realized, separate works -- one an artistic work, and the other a useful article.[26]

Judge Jon O. Newman, the eminent jurist on the Second Circuit, who speaks with special authority on the subject of copyright, embraces another approach -- the "temporal displacement" test set forth in his dissent in Carol Barnhart, Inc. v. Economy Cover Corp.[27] Under Judge Newman's test, "[f]or the design features to be 'conceptually separate' from the utilitarian aspects of the useful article that embodies the design, the article must stimulate in the mind of the beholder a concept that is separate from the concept evoked by its utilitarian function." The requisite "separateness" is said to exist "whenever the design creates in the mind of the ordinary observer two different concepts that are not inevitably entertained simultaneously." The test therefore is not whether the ordinary observer fails to recognize the object as a utilitarian article, but "only whether the concept of the utilitarian function can be displaced in the mind by some other concept."[28]

The Frank Lloyd Wright Foundation, in its comment, suggested that the test of conceptual separability should turn on whether or not "the ordinary observer understands the work as having a conceptually dual function -- that of a work of art and that of a useful article."[29] Under the Wright approach, sculptural elements embodied in works of architecture would be registrable if the conceptually separable sculptural elements otherwise meet the originality requirements. Under the Wright test such elements do not have to exist "side by side and be perceived as fully realized, separate works — one an artistic work, the other a useful article." And unlike Judge Newman's temporal displacement test, the Wright test does not require the observer to (temporarily) displace the utilitarian function. One need only appreciate the existence of the separable elements, a far less abstract task.

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[26] Paragraph 505.03. Compendium II Copyright Office Practices, 1984.

[27] 773 F.2d 411 (2d Cir. 1985).

[28] 773 F.2d at 422-423.

[29] Comment #11 at 20-21.

The Copyright Office presents these theories in barest outline to give Congress a foretaste of the kinds of arguments the courts will hear with ever greater frequency as litigants labor creatively to develop existing law and practice to meet the clear words of the Berne Convention. Unless Congress intervenes decisively and gives the courts clear guidance, we may find the courts wandering down garden paths that Congress might view with some alarm.

4. One Argument in Support of Protection for Works of Architecture Under Existing Law

To alert Congress to the very real possibility of a judicial resolution of the dilemma, the Copyright Office sees some value in presenting in greater detail at least one legal theory that could gain currency if the courts chose to act creatively without awaiting congressional clarification. We make this argument recognizing that, if embraced by the courts, it would create some difficulties in administering the law and would require a major revamping of Office practice.

This argument uses Frank Lloyd Wright's Guggenheim Museum as an example of a protectible work of authorship under existing law. The Guggenheim has been selected not because it is more or less protectible than any other structure, but because its unique design raises nicely the issue of protection for overall shape of works of architecture.

Overall shape of industrial products even though "aesthetically satisfying and valuable" is not protectible under current law.[30] This does not mean, however, that a work of architecture may not contain a conceptually separable overall shape.

Under one analysis, it could be reasoned that the Guggenheim is a building; that as a building it has an overall shape; that the artistic features of the Guggenheim are its overall shape; and that, ergo, there cannot be any separable elements.

Instead of this internally consistent, but circular, argument, one might ask the following two questions: (1) Can an ordinary observer conceive the presence of artistic features in the Guggenheim? (2) If so, are those features dictated by the Guggenheim's function as a museum? If not, then the artistic features are conceptually separable (protectible).[31] The advocates of this theory would answer those questions as follows: we should view the Guggenheim, as Wright did, as a "quiet unbroken wave," a continuous spatial helix, "expand[ing] as it coils vertiginously around an unobstructed well of space capped by a flat-ribbed dome."[32] These features are in no way dictated by the structure's function as a museum, and indeed it is the almost universal view of curators (and many patrons) that the Guggenheim functions very poorly as an art museum. No one doubts, though, that it operates superbly as a great work of art.

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[30] H.R. REP. NO. 1476, 94th Cong., 2d Sess. 55 (1976).

[31] Of course, the features would still have to meet the standard for originality applicable to all works of authorship.

Recognition of architecture as art is hardly new. Strauss began his 1959 study on the subject with the statement: "Architecture has traditionally been considered one of the arts, and the copyright laws of most countries provide specifically for copyright protection of 'artistic works of architecture.'"[33] Works of architecture have been a mandatory subject of protection in the Berne Convention since 1908. Nor have U.S. courts been totally hostile to such appreciation either. In Morris European & American Express Co. v. United States,[34] the court wrote the following in the context of a customs dispute:

> It is unnecessary to consider the contention that architectural works are not works of art, for writers such as Mr. Ruskin, and all the witnesses herein, refuse to impose a limitation which would exclude the famous churches, triumphal gates, and graceful towers of Europe. The further contention that it cannot be a work of art if adapted to a useful purpose would exclude the Ghiberti doors of Florence, or the fountains of Paris and Versailles.

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[32] Kostof, A History of Architecture: Settings and Rituals 740 (1985). In his 1959 study, Strauss recognized that museums and churches may have "both functional use and artistic form," and that the "dividing line between the primarily utilitarian and primarily artistic... becomes shadowy.. ." Strauss, Copyright in Works of Architecture 67, 77 (1959).

[33] Strauss, Copyright in Architectural Works 67 (1959).

[34] 85 F. 964 (CCSDNY 1881).

The relative importance of function in architecture is vastly overemphasized,[35] perhaps as a result of unfamiliarity with the discipline.[36] Very few architectural design elements are actually required by functional needs. There are hundreds, if not thousands, of non-functional design options in many architectural structures. It is precisely in the selection from these options that works of architecture, like music (sequence and arrangement of notes), painting (choice and arrangement of colors, line), and poetry (use of words as symbols) is created. Like composers, painters, and poets, an architect's choices reflect subjective, aesthetic judgment that constitutes the essence of creativity, the encouragement of which forms the foundation of copyright: "[B]uilding is not just a craft; it is an art form that reflects the philosophical, intellectual currents, hopes and aspirations of its time."[37]

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[35] Cf. Ponti, In Praise of Architecture: "Architecture lasts because it is art and surpasses its use."

[36] Another possibility is that some fail to appreciate architecture because is too familiar. See Abercrombie, Architecture as Art 7 (1983): "[A]rchitecture is the most familiar of all arts. Its very familiarity obscures its vision as an art, for we know so many things about architecture that are extraneous to art: We may know its location and the building it replaced, its insurance rates and mortage payments, its occupants and its furniture, how well its air conditioning works and how often its floors are swept. We cannot escape the burden of this esthetically irrelevant information any more easily than we can escape architecture itself."

[37] What Style is It? 10(1983). See also, Messler, The Art Deco Skyscraper in New York 63 (1988) [Hereinafter cited as Messler]: "There is no agreement on symbols or borrowed images employed in Art Deco skyscrapers. Every single image gained esthetic relevance merely within the logical framework of the individual composition of a specific building and could not be translated into the composition of another without disturbing the desired effect. The majority of images are decorative, and each building represents a choice. The Art Deco composition is based on the creative arrangement of chosen parts, and accounts for the strong relationship between the viewer and the building." As noted architectural critic Ada Louise Huxtable described Italian architect Aldo Rossi: "Rossi is a poet as much as he is

Ordinary people do not flock to French Gothic cathedrals such as Chartres to admire their technical construction; they go to experience art (and/or religion). Chartres' "function," it's strict utility, is dwarfed by its eternal artistic statement of the spirit of Christian faith. Many works of architecture, from the Parthenon to the Guggenheim, are structurally inefficient:

> Although classical architecture operates on the emotions ... its beauty has little or nothing to do with modern ideas of structural efficiency.... All these buildings were, in fact, thoroughly inefficient. The compressive stresses were absurdly low, while the tensible stresses in the lintels were far too high, often dangerously so. The roofs of classical buildings ... can only be described as a structural mess. But there is nothing wrong with most of these buildings aesthetically."[38]

The twentieth century, for a variety of reasons, does not possess architecture that impresses vast numbers of people with the same awe as Chartres. But buildings such as William Van Alen's Art Deco Chrysler Building in New York City draw tens of thousands admiring visitors each year. Such buildings speak to us in an artistic language we appreciate, a communication that has nothing to do with functional necessities:

> Art Deco architects saw themselves as fundamentalists intending to carry on the real tradition of architecture. In an esthetic which was based on artistically calculated surface appeals, Art Deco architects believed they had found, in fact, rediscovered, the

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an architect. He is making poetry out of visual devices, as a writer uses literary or aural devices. As words become symbols, so do objects: the architectural world is an endless source of symbols with unique ramifications in time and space. Architecture has given Rossi his poetic and artistic vocabulary." Huxtable, Architecture Anyone? 45-46 (1986).

[38] Gordon, Structures: Or Why Things Don't Fall Down 370 (1986).

> true character of the art of building; everything for them began with obscuring constructional reality; architecture became art when the desired synthesis of practical and spiritual values became an optical fact.[39]

This is not to say that many works of architecture would be protectible as a whole. Some, such as the Chrysler building, might be protectible only insofar as the top,[40] although even here a strong case can be made out for protection of the whole. Other buildings, including the majority of commercial buildings and virtually all noncustom single-family homes would not be protectible to any degree, or would only possess a "thin" copyright covering the minimum elements found protectible.[41]

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[39] Id. at 96. "Stylistic form and construction represent two different design issues. They can be held separate spiritually and intellectually," id. at 42; "In the Art Deco era skyscrapers were ardently propagated as the symbol of America. Although they were technologically complicated, skyscrapers were primarily treated as highly esthetic structures. In terms of technology, the architectural elements of skyscrapers were all evident by 1890p," id. at 63; "The Art Deco facade is obviously not enslaved to existing technology. Each facade represents the idealized exteriorization of private emotion." Id. at 109, 42, 63 and id. at 105, discussing Ralph Walker's Telephone Building between 17th and 18th Streets and 7th and 8th Avenue in New York City: "the raw masses are subject to a process of mystical transformation in which facts about working with brickmasonry hung on the frame are exploited. Sculptural formations of the facade are by no means the logical reflection of the mechanical elements buried underneath. These formations, together with the subdued polychromy of individual bricks and the shadow projections over windows are the result of the architect's desire to regulate mass effectively, to compose beautifully."

[40] In the case of the Chrysler Building one can readily conceive the presence of stylish Art Deco artistic features. These features are in no way dictated by the function of the Chrysler Building as a skyscraper.

The analysis set forth in the text applies equally to the interiors of works of architecture, and the lobby of the Chrysler Building is one example of a protectible interior. The Guggenheim is another.

[41] Of course, a number of architect-designed houses would be protectible.

The 1976 House Judiciary Committee Report indicates that conceptually separable sculptural elements embodied in works of architecture are protectible under the 1976 Act. This is in keeping with the 1959 Strauss Copyright Office study, which noted the possibility that "artistic architecture" could be protectible, [42] and with responses given by Register of Copyrights Ralph Oman in 1988 to written questions posed by Senator Heflin: "While we do not protect the structure or functional aspects of buildings, copyright can protect the separate artistic features, if any, that are independent of the utilitarian aspects of any useful article, including a building." [43]

Decisions made by Congress in adhering to the Berne Convention confirm the existence of protection for some architectural works under current law. During the deliberations on Berne adherence, it was acknowledged that Article 2(1) of Berne requires protection at least for artistic elements of an otherwise functional structure. Berne compatibility could, therefore, be achieved in only two ways: (1) existing law could be deemed to protect such elements; or, (2) legislation could be enacted providing the needed protection.

In 1985, the Ad Hoc Committee on Berne Adherence concluded that existing U.S. law did not provide the requisite protection for works of architecture to meet Berne compatibility. [44] The Copyright Office, in 1986, in conjunction with Senate subcommittee staff, prepared a draft Berne implementation bill that would have expressly protected works of architecture.[45] The subsequent Berne implementation bills that were introduced adopted this approach.[46]

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[42] Strauss, Copyright in Architectural Works 70-71 (1959).

[43] The Berne Convention: Hearings on S.1301 and S. 1971 Before the Subcomm. on Patents, Copyrights & Trademarks, Senate judiciary Comm., 100th Cong., 2d Sess. 182 (1988)("1988 Senate Berne Hearings").

[44] See Chapter 4, text at nn. 73-75.

Representative Kastenmeier signalled a reversal in the attitude of the 100th Congress toward the level of existing protection for works of architecture on February 18, 1988, when he testified before the Senate. After noting the "original assumption" that U.S. law relative to works of architecture needed to be amended to comply with Berne, Chairman Kastenmeier stated: "[D]uring House hearings convincing testimony suggested that present U.S. law already protects works of architecture... ."[47] The testimony referred to by Chairman Kastenmeier had been given ten days earlier, before his subcommittee, by Professor Paul Goldstein and former Register of Copyrights Barbara Ringer, both of whom would seemingly support the argument propounded in this section.

Professor Goldstein's opinion that the 1976 Copyright Act protected at least certain types of works of architecture was based on his interpretation of page 55 of the 1976 House Judiciary Committee Report:

> I am comforted by the fact that existing law forms the basis for substantial protection of architectural works in this country. The House Report on the 1976 Act, in referring to

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[45] See Chapter 4, text at n.72.

[46] See generally review of the Berne implementing legislation in Chapter 4, supra. The one exception, H.R. 4262, a clean bill version of H.R. 1623, was the result of the reversal in attitude discussed in the text. See also Chapter 4 text.

[47] 1988 Senate Berne Hearings at 54-55. See also id. at 64 (comments of Rep. Moorhead, noting Ms. Ringer's testimony).

> section 101's definition of artistic works, deals with the notion of both physical and conceptual separability. Courts have interpreted conceptual separability in a way that would enable protection of substantial features of architectural works without monopolizing their utilitarian content. I think it's a good way to proceed for the time being.[48]

Former Register of Copyrights Barbara Ringer expressly endorsed Professor Goldstein's interpretation.[49]

The essence of this testimony is that present law, including the requirement of conceptual separability, is sufficient to provide protection for architectural works (and features of such works) based upon their demonstrable artistic character. The belief that this was compatible with the Berne Convention rested upon the fact that many Berne Union countries did not generally protect buildings per se, but only those containing clear artistic features or character. In short, that absent a more detailed examination, the requirements of artistic content (but not quality) present in Berne legislation might tend to produce similar results when variant U.S. tests of copyrightability were applied to the same subject matter.

Congress' acceptance of this position is evidence that the present law is flexible enough to protect works of architecture at least insofar as they are or they embody pictorial, graphic or sculptural expression and that distinctions between commonplace, tract housing and other, more artistically realized, structures would be Berne compatible.

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[48] House Berne Hearings at 679-680.

[49] Id. at 689.

Based on Ms. Ringer and Professor Goldstein's testimony that existing law need not be changed to comply with Berne's requirement that works of architecture be protected, the 100th Congress reversed its approach to the issue and chose not to amend the Copyright Act to provide express protection. Congress's deliberate decision to delete from the Berne implementing legislation express protection for works of architecture--based on a belief that such protection already existed (or was compatible with Berne under the minimalist standard) -- is evidence that the protection exists.

5. Summary

Notwithstanding the force of this argument, which Congress can best judge, the 1976 Copyright Act, as we have already noted in Chapter 4, defines "pictorial, graphic, and sculptural works" as including designs of useful articles only if, and only to the extent that, the design "incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article." This statutory definition applies to all useful articles, including works of applied art and functional architectural structures. Known as the "separability test," Congress derived this part of the definition from a Copyright Office separability test established by regulation in 1959.

The 1976 House Report gives the definitive explanation of the separability test.

> [A]lthough the shape of an industrial product may be aesthetically satisfying and valuable, the Committee's intention is not to offer it copyright protection under the bill. Unless the shape of an automobile, airplane, ladies'

> dress, food processor, television set or any other industrial product contains some element that, physically or conceptually, can be identified as separable from the utilitarian aspects of that article, the design would not be copyrighted under the bill. The test of separability and independence from "the utilitarian aspects of the article" does not depend upon the nature of the design--that is, even if the appearance of an article is determined by esthetic (as opposed to functional) considerations, only elements, if any, which can be identified separately from the useful article as such are copyrightable. And, even if the three-dimensional design contains some such element (for example, a carving on the back of a chair or a floral relief design on silver flatware), copyright protection would extend only to that element, and would not cover the over-all configuration of the utilitarian article as such.[50]

Earlier in this Chapter, we discussed the specific passage in the 1976 House Report regarding protection of architectural structures. It would appear that Congress intended the statutory definition of pictorial, graphic, and sculptural works, including the separability test, to be applied to architectural structures. Like works of applied art, the separable artistic features of architectural structures can be protected by copyright, but not the overall shape of the structure.

Congress reiterates its intention in the Berne Implementation Act of 1988. The House Report states that the Implementation Act leaves untouched two fundamental principles of our copyright law, one of which is the separability test for determining whether any features of useful articles, including architectural structures, are subject to copyright. The

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[50] H. REP. NO. 1476, 94th Cong., 2d Sess. (1976) at 55.

Report explains the separability test as applied to architectural structures as follows:

> Specifically, this means that even though the shape of a useful article, such as a building, may be aesthetically satisfying and valuable, the copyright law does not protect the shape. This test of separability and independence from the utilitarian aspects of the useful article does not depend upon the nature of the design--that is, even if the appearance of the useful article is determined by aesthetic, as opposed to functional considerations, only those pictorial, sculptural or graphic elements, if any, that can be identified separately from the shape of the useful article are copyrightable. Even if the three-dimensional design contains a separate and independent artistic feature (for example, a floral relief design on flatware or a gargoyle on a building), copyright protection would not cover the over-all configuration of the useful article as such.
>
> In the case of architectural works, in addition to protection for separable artistic sculpture or decorative ornamentation, purely non-functional or monumental structures may be subject to copyright.[51]

This explanation suggests that, in passing the Berne Implementation Act, Congress intended no change in the conventional understanding of the separability test, and confirms that the overall shape of a functional structure, however attractive or aesthetically pleasing, cannot be protected by existing federal copyright law. The congressional finding that existing law is compatible with the requirements of Berne regarding architectural plans, structures, and works related to architecture was based on "a degree of protection under copyright against copying of plans and separable artistic works," and on "additional causes of action for misappropriation" under state contract and unfair competition law.[52]

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[51] H.R. REP. NO. 609 at 50-51 (1988) (emphasis added).

B. CONCLUSIONS

1. Existing United States Law.

In Chapter 3, we reviewed the existing case law in the United States on works of architecture and works related to architecture. These decisions were fairly consistent in refusing to extend copyright in architectural plans to encompass the structures depicted therein. A number of these decisions, in dicta, concluded that under the Supreme Court's decision in Baker v. Selden, structures themselves are not subject to copyright protection. Despite the strong dissent in Barnhart, no court has suggested that functional architectural structures are subject to protection.

As a consequence, the Copyright Office has drafted its practices in a manner that precludes copyright in the conceptually inseparable elements of functional architectural structures. The courts have upheld the Office's refusal to register claims based on these practices involving utilitarian articles such as lamps and typefaces. Nonfunctional structures such as monuments -- including elaborate funeral crypts -- have, however, long been registrable, as have separable elements of buildings. Gargoyles and decorative detailing come to mind.

Under the Copyright Office's interpretation of conceptual separability, as set forth in the Compendium, and unless or until we are directed otherwise by Congress or the Court, we will not register claims to elements of works of architecture that fail to meet that standard.

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[52] Id. at 50.

Nor do we believe that adherence to the Berne Convention alters this result. The Berne implementing legislation was passed with the express understanding that Congress intended no change in existing law with respect to works of architecture. Congress did recognize that a number of Berne countries, but not all, appeared to protect functional architectural structures, but was uncertain of the extent of the actual protection accorded, or how much of that protection was dictated by Berne or merely reflected a national preference. Congress, therefore, was uncertain of the United States' actual obligations under the Convention. This study was designed to clarify those obligations.

Our review of existing law in the United States, the evolution of protection for works of architecture in the Berne Convention, and the laws and practices in Berne member countries, suggests that absent legislative or judicial clarification of how the rules governing copyrightability for useful articles applies to "fine" architectural expression at the very least, U.S. law may well prove inadequate to fulfill the requirements of the Berne Convention.

2. Summary of Foreign Law Protection of Works of Architecture.

The subject matter article of the Berne Convention, Article 2(1), makes specific reference to three categories of literary and artistic works that relate to architectural structures: works of architecture; illustrations and plans relative to architecture; and three-dimensional works relative to architecture. The second and third categories appear to be adequately protected by United States copyright law -- that is, architect's blueprints, architectural models, and separable artistic features apart from the overall shape are protected by our copyright law. Whether the combination of federal and state protection adequately protects works of architecture remains in doubt.

In our survey of Berne member states, we attempted to probe into the precise meaning of the requirement to protect works of architecture. Clear answers have proved elusive -- in part because language and cultural differences make comparison and analysis difficult. We see, for example, that the most recent international attempt to state uniform principles of protection for works of architecture for a model law reached somewhat inconclusive results. The countries did agree that the obligation extends to "original creative elements" in respect of works of architecture, but there was no consensus on adding the criterion "artistic" as a limitation on the types of buildings subject to protection. The countries agreed that the right of reproduction includes the right to construct the work of architecture and the making of copies in any manner or form of the works relative to architecture. Authors of works of architecture would enjoy the exclusive right of authorizing alterations except alterations of a practical or technical nature which are necessary to the owner of the building. Authors would enjoy moral rights of paternity "in the customary way" and of integrity (that is, to prohibit any distortion, mutilation or other modification of, or other derogatory action in relation to the work of architecture that would be prejudicial to honor or reputation). Finally, a consensus exists that reproduction of external images of works of architecture may be permitted for private purposes and even for commercial purposes where the structure is on a public street, road, or other publicly accessible place.

The copyright law of virtually every Berne member country makes express reference to protection for buildings and structures. Works of architecture are generally protected without the need, apparently, to meet a higher standard of originality such as artistic merit. Some countries, however, do apply a standard of artistic merit or at least extend special privileges to authors of such works. Works of architecture are subject to the general infringement provisions for damages except that in general an injunction is not available once construction of the alleged infringing building has begun, and the courts, as a remedy, may not order the demolition of infringing buildings.

3. Alternative Legislative Solutions.

(1) Create a new subject matter category for works of architecture in the Copyright Act and legislate appropriate limitations.

Congress could create a new subject matter category covering works of architecture and legislate appropriate limitations. A proposal along the lines of H.R. 1623 in the 100th Congress is one possibility. Among the issues needing particular legislative consideration are the following:

- the exact nature of the buildings covered by the new subject matter category (if Congress wishes, protection could be confined to "fine artistic structures," or to structures that exist in a unique form, with a specific exclusion for residential tract housing);

- the nature of the limitations on the exclusive rights (limitations such as the right of the building owner to make technical alterations, and the owner's right to make external images, both of which are common);
- the nature of specific moral rights protection, if Congress deems additional protection warranted; and
- the nature of the remedies (for example, limiting injunctive relief and preventing destruction of buildings).

(2) **Amend the Copyright Act to give the copyright owner of architectural plans the right to prohibit unauthorized construction of substantially similar buildings based on those plans.**

Congress could give serious consideration to the proposal of the American Institute of Architects for a limited amendment of the Copyright Act, in the nature of a right to prohibit unauthorized construction of substantially similar buildings based upon copyrighted architectural blueprints. One factor that Congress may wish to consider in this regard is that, as shown in Chapter 2, the smaller architectural firms would most likely find their works copied, and they would, therefore, benefit the most from increased protection.

If this alternative is pursued, however, Congress should also consider legislating with reference to the issues identified under the first alternative: what structures should it protect, and what limitations should it impose on rights and remedies.

(3) Amend the definition of "useful article" in the Copyright Act to exclude unique architectural structures.

As a simpler alternative, Congress could amend the definition of "useful article" in the Copyright Act to exclude unique (i.e., generally single copy) architectural structures. By this amendment, the separability test of the definition of pictorial, graphic, and sculptural works would no longer apply to unique architectural structures. Their overall shape could be protected by copyright if the design is original within the meaning of the copyright law. By limiting the amendment to unique architectural structures, Congress would minimize the impact of the change in the law affecting works of architecture, and thereby avoid possible dislocations in the construction industry. At the same time, this approach would protect the most deserving architectural structures.

This approach would not be favored by those who might seek protection for a broad class of architectural structures. The amendment should probably be very specific and narrow in respect of the structures affected.

(4) Do nothing and allow the courts to develop new legal theories of protection under existing federal statutory and case law, as they attempt to come to grips with U.S. adherence to the Berne Convention and allow the various state court remedies to develop.

As we have seen, novel theories for extending protection to works of architecture under federal law abound. Congress could permit the courts to review these theories and their applicability to works of architecture in light of Berne adherence. This approach would permit the courts to develop the law with the benefit of a specific set of facts, but has the disadvantage of leaving open the possibility of conflicting theories as well as the possibility of inadequate protection for subject matter we have concluded the United States is obligated to protect under the Berne Convention.

In conclusion, the Copyright Office expresses no preference for a particular solution, legislative or otherwise. We recommend that Congress hold additional hearings and give further serious consideration to enacting additional protection for works of architecture. The Office will be pleased to offer whatever technical assistance may be requested.

APPENDIX A

ONE HUNDREDTH CONGRESS

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ASSOCIATE COUNSEL
ALAN F. COFFEY, JR.

April 27, 1988

The Honorable Ralph Oman
Register of Copyrights
Library of Congress
Department 100
Washington, DC 20540

Dear Mr. Oman:

As a result of recent communications by architects and representatives of the construction industry regarding the nature and scope of protection for works of architecture. I have concluded that it would be helpful to the Congress for the Copyright Office to conduct a general inquiry into these issues.

Without dictating the precise contours of the inquiry, I believe the Copyright Office should examine the type of copyright and other forms of legal protection (i.e., contractual, trade dress and unfair competition) currently accorded architectural works; the need, if any, for protection beyond that now available, including whether perceived deficiencies are capable of resolution through private, consensual arrangements. The inquiry should also assess the effect enhanced protection would have on competition and the public interest.

In carrying out this inquiry, the Copyright Office should consult with as broad a spectrum of interests and specialist (public and private) as possible. In particular, you should consult with architects, builders of and contractors for commercial and residential structures, appropriate government agencies, academics, and interested members of the consuming public.

A survey and comparative study of the laws and actual practices of selected foreign countries in protecting works of architecture under copyright or other legal theories would also be helpful.

Please do not hesitate to consult with the Subcommittee staff if you need further information, and to discuss a timetable for conducting your inquiry.

With warm regards,

Sincerely,

Bob Kastenmeier

ROBERT W. KASTENMEIER
Chairman
Subcommittee on Courts,
Civil Liberties and the
Administration of Justice

RWK:dbv

APPENDIX B

ANNOUNCEMENT
from the Copyright Office, Library of Congress, Washington, D.C. 20559

NOTICE OF INQUIRY

NOTICE OF INQUIRY: WORKS OF ARCHITECTURE

The following excerpt is taken from Volume 53, Number 110 of the Federal Register for Wednesday, June 8, 1988 (pp. 21536-21538)

LIBRARY OF CONGRESS

Copyright Office

[Docket No. RM 88–4]

Notice of Inquiry; Works of Architecture

AGENCY: Library of Congress, Copyright Office.

ACTION: Notice of inquiry: Works of architecture.

SUMMARY: The Copyright Office of the Library of Congress issues this notice of inquiry to advise the public that it is examining the scope of copyright and other forms of legal protection currently accorded works of architecture and the need, if any, for protection beyond that now available.

The Office invites comments from architects, builders of and contractors for commercial and residential structures, government agencies, academics, and interested members of the public.

DATE: Initial comments should be received by September 16, 1988. Reply comments should be received by November 16, 1988.

ADDRESS: Interested persons should submit ten copies of their written comments as follows:

If sent by mail: Library of Congress, Department 100, Washington, DC 20540.

If delivered by hand: Office of the Register of Copyrights, Copyright Office, James Madison Memorial Building, Room 403, First and Independence Avenue SE., Washington, DC 20559.

FOR FURTHER INFORMATION CONTACT: William Patry, Policy Planning Advisor to the Register of Copyrights, Copyright Office, Library of Congress, Washington, DC 20559. Telephone: (202) 287–8350.

SUPPLEMENTARY INFORMATION: At the request of the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary and the Subcommittee on Patents, Copyrights, and Trademarks of the Senate Committee on the Judiciary, the Copyright Office is examining the scope of copyright and other forms of legal protection (e.g., contractual, trade dress, and unfair competition) currently accorded works of architecture as well as two- and three-dimensional works related to architecture. The Office is also examining whether there is a need for protection beyond that currently available, including whether perceived deficiencies are capable of resolution through contractual agreements, what form increased protection, if any, should take, and the impact such enhanced protection would have on competition and the public.

The Berne Adherence Bills

H.R. 1623, the original bill introduced by Representative Kastenmeier on March 16, 1987 to implement the provisions of the Berne Convention for the Protection of Literary and Artistic Property, proposed to amend the Copyright Act to provide explicitly for protection of certain buildings and structures, subject, however, to certain exceptions and limitations. See also H.R. 2962 (Moorhead, introduced on behalf of the Administration).

Section 5 of H.R. 1623 would have amended 17 U.S.C. 102(a) by including "architectural works" as a protected form of subject matter. Section 4(a) defined "architectural works" as: "Buildings and other three-dimensional structures of an original artistic character, and works relative to architecture, such as building plans, blueprints, designs, and models." Section 9 of the bill would have provided a new 17 U.S.C. 120(a) containing limitations on works of architecture, including protection for only the "artistic character and design" and not the "processes or methods of construction;" an exemption for the **making, distribution or public display of pictures, paintings, and photographs of works of architecture located** in publicly accessible locations; a statutory right of owners of a building embodying an architectural work to have minor alterations made in order to enhance its utility; a prohibition against the seizure or destruction of infringing buildings; and finally, a limitation on the copyright owner's ability to obtain an injunction restraining the construction of an infringing building to only those situations where construction of the building has not been substantially completed.

During the extensive hearings held by the Subcommittee on Courts, Civil Liberties and the Administration of Justice on Berne adherence, there was little reference to whether the requirements of Article 2(1) of the Paris text of Berne [1] mandated the explicit treatment of architectural works in the manner contemplated by H.R. 1623. Two witnesses testified that Berne may not require such treatment. The American Institute of Architects submitted a written statement to the Subcommittee stating a preference for a prevision of[2] the Copyright Act making it an act of infringement to construct a building based on reproduction of copyright[3] architectural plans. The AIA stated, however, that it was not then seeking protection for the buildings themselves.

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[1] Article 2(1) provides in relevant part that the expression "literary and artistic works" protected under the Convention includes "works of architecture" and "illustrations, maps, plans, sketches and three-dimensional works relevant to architecture."

In light of the minimalist approach taken to Berne adherence and the lack of a consensus that U.S. law needed revision in order to comply with Article 2(1) of Berne, the clean bill version of H.R. 1623—H.R. 4262—as introduced on March 28, 1988 and passed by the House of Representatives on May 10, 1988, deleted the above-mentioned provisions of H.R. 1623 concerning architectural works, and instead amended the definition of "pictorial, graphic, and sculptural works," in 17 U.S.C. 101 to encompass, in relevant part, "diagrams, models, and technical drawings, including architectural plans."

The Committee Report accompanying the bill explained:

> The Committee concluded that existing United States law is compatiable with the requirements of Berne. In addition to a degree of protection under copyright against copying of plans and separable artistic works, additional causes of action for misappropriation may be available under state contract and unfair competition theories.
>
> The bill leaves, untouched, two fundamental principles of copyright law: (1) That the design of a useful article is copyrightable only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from and are capable of existing independently of the utilitarian aspects of the useful article; and, (2) that copyright in a pictorial, graphic, or sculptural work, portraying a useful article as such does not extend to the reproduction of the useful article itself.
>
> Specifically, this means that even though the shape of a useful article, such as a building, may be aesthetically satisfying and valuable, the copyright law does not protect the shape. This test of separability and independence from the utilitarian aspects of the useful article does not depend upon the nature of the design—that is, even if the appearance of the useful article is determined by aesthetic, as opposed to functional considerations, only those pictorial, sculptural or graphic elements, if any, that can be identified separately from the shape of the useful article are copyrightable. Even if the three-dimensional design contains a separate and independent artistic feature (for example, a floral relief design on flatware or a gargoyle on a building), copyright protection would not cover the over-all configuration of the useful article as such.
>
> In the case of architectural works, in addition to protection for separable, artistic sculpture or decorative ornamentation, purely non-functional or monumental structures may be subject to copyright.
>
> The Committee has not amended section 113 of the Copyright Act and intends no change in the settled principle that copyright in a pictorial, graphic, or sculptural work, portraying a useful article as such, does not extend to the reproduction or manufacture of the useful article itself.

H.R. Rep. No. 100–609, 100th Cong., 2d Sess. 50–51 (1988).

The Senate, in its original Berne adherence legislation, proposed provisions on architectural works identical to those found in H.R. 1623. See S. 1301 (introduced May 29, 1987) by Senator Leahy, *see also S. 1971* (Hatch, on behalf of the Administration). Similarly, in reporting S. 1301 out of the Committee on the Judiciary, the Senate deleted these earlier provisions, replacing them instead with a revision to the definition of pictorial, graphic and sculptural works to expressly include architectural plans. This approach was also based on the minimalist theory of Berne adherence and the Committee's conclusion that: "U.S. Copyright Law, as modified by this Act, and other state and federal remedies, protect architectural works to the extent required by the Berne Convention." S. Rep. No. 100–352, 100th Cong., 2d Sess. 9 (1988). At the same time, the Committee noted that it "deliberately leaves in place the final sentence" of the definition of "pictorial, graphic, and sculptural works," which states that the design of a useful article (as also defined in Section 101) such as a building or structure will be considered a protected pictorial, graphic, or sculptural work.

Only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of the utilitarian aspects of the article.

S. Rep. No. 100–352 at 9.

Case Law

The case law has, on the whole, made a distinction between copyright in architectural plans and protection for the architectural structure. See *Demetriades v. Kaufman*, 86 Civ. 0848 (S.D.N.Y. filed March 8, 1988). But Cf. *Herman Frankel Org. v. Wolfe*, 184 U.S.P.Q. 819 (E.D. Mich. 1974). Some courts have awarded damages based on the profits derived by the defendant from sales of the houses. See *Robert R. Jones Associates v. Nino Homes*, CCH Copr. L. Rep. ¶26,165 (E.D. Mich. 1987); *Arthur Rutenberg Corp. v. Dawney*, 647 F. Supp. 1214 (M.D. Fla. 1986): *Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Construction Co.*, 542 F. Supp. 252 (D. Neb. 1982).

Issues have also arisen over who is the copyright owner of architectural drawings: the commissioning party or the architect. See *Aitken, Hazen, Hoffman & Miller, supra.*; *Meltzer v. Zoller*, 520 F. Supp. 847 (D.N.J. 1981). Cf. generally, *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984) with *Easter Seal Society for Crippled Children and Adults of Louisiana, Inc. v. Playboy Enterprises*, 815 F.2d 323 (5th Cir. 1987), *cert. denied*, 56 U.S.L.W. 3661 (U.S. March 28, 1988) (No. 87–482) and *Community for Creative Non-Violence v. Reid*, No. 87–7051 (D.C. Cir. filed May 20, 1988).

Other forms of protection have also been sought for design aspects of buildings. *Associated Hostworks of California v. Moss*, 207 U.S.P.Q. 973 (W.D.N.C.) (trade dress); *White Tower System, Inc. v. White Castle System of Eating Houses Corp.*, 90 F.2d 67 (6th Cir.), *cert. denied*, 302 U.S. 1937 (id.); *Fotomat Corp. v. Cochran*, 437 F. Supp. 1231 (D. Kan. 1977) design of building found to operate as service mark). But cf. *Demetriades v. Kaufman, supra.* (denying preliminary injunction under Lanham Act section 43(a) and finding that plaintiff was unlikely to prove on the merits, that a residential house had acquired secondary meaning, and stating conclusion that "extending section 43(a) protection to individual, residential designs would work a profound mischief in both the law and the home-building industry.")

Design patent protection has been found applicable to architectural components, although these decisions are sparse and relatively old. *Riter-Conley Mfg. Co.* v. *Aiken*, 203 F. Supp. 699, 702 (3d Cir. 1913); Ex Parte Foshay, 7 U.S.P.Q. 121 (Pat. Off. Bd. App. 1930).

Although unfair competition may provide remedies in some circumstances, courts in specific cases have held unfair competition claims to be preempted by section 301 of the Copyright Act. *Demetriades* v. *Kaufman, supra.*; *Schuchart & Associates* v. *Solo Serve Corp.*, 540 F. Supp. 928, 943–945 (W.D. Tex. 1982).

Contractual arrangements, to the extent enforceable under state law, of course, provide another avenue of protection.

Nature of the Inquiry: The Office's examination touches on three broad areas: (1) The type of copyright and other forms of protection (i.e., contractual, trade dress, unfair competition, etc.) currently accorded works of architecture and works related to architecture; (2) the need, if any, for protection beyond that now available including whether perceived deficiencies are capable of resolution through private consensual arrangements; and (3) the laws and actual practices of foreign countries in protecting works of architecture and works related to architecture.

---

[2] Error; line should read:
"stating a preference for a revision of"

[3] Error; line should read:
"based on reproduction of copyrighted"

Specific Questions: The Office seeks comments in the following specific areas:

Subject Matter and Scope of Protection

1. What forms of legal protection are presently available to protect works of architecture and works related to architecture?

2. Is that protection sufficient to foster the economic and aesthetic interests of those involved in the creation and exploitation of such works?

3. If not, should the creators of works of architecture and works related to architecture have the exclusive right under the Copyright Act or other forms of protection to authorize the reproduction of their works? Should copyright or other forms of protection be extended to buildings or structures provided they contain externally or internally conceptually separable elements as to form or design, and if so, what test should be used to determine whether conceptual separability exists? Cf. *Esquire* v. *Ringer*, 591 F.2d 796 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 908 1979); *Kieselstein-Cord* v. *Accessories** *by Pearl, Inc.*, 632 F.2d 989 (2d Cir. 1980); *Carol Barnhart, Inc.* v. *Economy Cover Corp.*, 773 F.2d 411 (2d Cir. 1985); *Brandir International, Inc.* v. *Cascade Pacific Lumber Co.*, 5 U.S.P.Q. 2d 1089 (2d Cir. 1987).

If copyright of other forms of protection should not be extended to the buildings or structures themselves, should it be extended to prevent the construction of buildings or structures based on infringing architectural plans, drawings, elevations, or three-dimensional models; and, if so, would such a right, in practice, nevertheless result in protection of buildings or structures?

What is the effect of 17 U.S.C. 102(b) and *Baker* v. *Selden*, 101 U.S. 99 (1879) on such protection? Can a building or structure be a "copy" of architectural plans it is derived from, and if so, does it make a difference whether the building or structure itself constitutes a copyrightable work?

4. What is the effect of architects' use of classical or other public domain elements such as designs that are staple, commonplace, or familiar in the industry?

5. If protection should be granted to buildings or structures, what should the scope of that protection be? Should the standard for infringement of buildings or structures be the same as for traditional copyrighted works of the arts, i.e., substantial similarity? How would recent decisions on the total concept and feel test apply to infringement of works of architecture?

6. Should the owner of the intellectual property rights in a protected work of architecture have the right to prohibit others from constructing an otherwise infringing work if those others have created their work without the aid of the original plans, drawings, elevations, or three-dimensional models, such as by viewing the protected work or by taking its measurements? Should the owner of the intellectual property rights in a protected building have the right to require destruction of completed or uncompleted buildings or structures? What would the appropriate monetary remedies be for infringement of a protected work of architecture or work related to architecture?

7. If the owner of the intellectual property rights in a work of architecture conveys those rights, should he or she still have the right to prohibit alterations to the work, and if so, what kind of alterations, all or only those that are not of a practical or technical nature necessary for maintenance or repair? If he or she should have the right to prohibit alterations (or at least those of a non-utilitarian purpose or effect), and the owner of the material embodiment of the work makes unauthorized alterations, what should the the available remedies be?

Should the owner of the intellectual property rights in a work of architecture ever have the right to require or demand the destruction of infringing buildings or structures or to prohibit their removal from a specific site?

8. Should the owner of the intellectual property rights in a protected work of architecture that has been altered without consent have the right to prohibit his or her association or authorship with the work?

9. Assuming rights should be granted to works of architecture, how long should the term of protection be, and if federal rights are involved, including copyright, what should the extent of preemption of state law be?

10. If rights were granted to works of architecture, should there be an exemption for the making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations if the work is located in a place accessible to the public, and if so, should the exemption be limited to noncommercial uses? What role would the fair use doctrine play if protection were granted?

11. Who should the initial owner of intellectual property rights in a protected work of architecture be, and how would the work for hire doctrine in the Copyright Act affect ownership questions? How are questions of ownership of intellectual property rights in works related to architecture presently resolved? Does that system work effectively? How would the copyright concept of joint ownership operate if protection were extended to works of architecture?

Contractual Practices

12. Can private, consensual agreements resolve any perceived deficiencies with the current state of protection for works of architecture and works related to architecture?

Foreign Law and Practices

13. What is the nature and extent of protection granted in foreign countries to works of architecture and works related to architecture and how is that protection actually accorded in practice? Are foreign practices relevant or applicable to practices in the United States?

Copies of all comments received will be available for public inspection and copying between the hours of 8:30 a.m. and 4:00 p.m. Monday through Friday, in Room 401, James Madison Memorial Building, Library of Congress, First and Independence Avenue SE., Washington, DC 20559.

Dated: May 26, 1988.

Ralph Oman,

Register of Copyrights.

William J. Welsh,

Deputy Librarian of Congress.

[FR Doc. 88-12872 Filed 6-7-88; 8:45 am]

BILLING CODE 1410-07-M

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*Error; line should read:
"(1979); Kieselstein-Cord v. Accessories"

APPENDIX C

Francis X Arvan
Architect

August 16, 1988

Mr. William Patry
Policy Planning Advisor
Copyright Office
Library of Congress
Washington, D.C. 20559

RE: Copyright Protection for Works of Architecture

Dear Mr. Patry:

I am an architect with my own practice in New York. I would like to offer my opinion of the copyrighting of architectural designs. Aarchitects often refer to aspects of other buildings to verify their ideas. The use of precedent is necessary and commonplace.

This is not to say than an architect is justified in copying too closely another's work. It is this "too closely" qualification which makes copyrighting a difficult question.

I believe copyright laws would also stifle the creativity of architects, as excessive litigation has, by adding the undue burden of originality verification. Because of this subjectivity and because it is rare that a building is copied exactly, copyright laws for works of architecture are unnecessary.

Thank you for your attention.

Frank X. Arvan

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OF COPYRIGHT
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493 North Broadway North Tarrytown New York 10591 914 332 4191

MICHAEL H. MINNS
ATTORNEY AT LAW

WESTERN RESERVE LAW BUILDING
7556 MENTOR AVENUE MENTOR, OHIO 44060
TELEPHONE (216) 953-0722

Comment Letter
RM 88-4
No. 7

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SEP 7 1988

Public Comment is Invited on Copyright Protection for Architectural Works

The U. S. Congress has been considering joining an international copyright treaty, the Berne Convention. One of the issues is the scope of architectural work protection. Both the House and Senate decided that the current copyright law provides sufficient protection to meet the minimum requirements of the Berne Convention. However, both the House and Senate have requested the Copyright Office to examine the scope of current protection for architectural works and whether there is a need for any expansion of this protection.

Current copyright law protects architectural plans but does not extend to the structure or building itself. You can stop someone from copying your plans but cannot prevent them from copying your building or house. The only copyright protection available is for completely non-functional structures such as monuments or for decorative ornamentation or embellishments added to the structure.

The Copyright Office is seeking comments on:

1) Is the current copyright protection adequate? ?

2) Should the creator of an architectural work have exclusive rights to reproduction of the structure? Yes?

3) Should the standards for infringement be the same as for traditional works of art, i.e., substantial similarity? Yes?

4) Should the creator of the architectural work have the right to prohibit alterations to the work? Should he be allowed this right if he transfers his ownership in the copyright? Yes? Ye

5) Should the owner of the copyright in an architectural work that has been altered without consent have the right to prohibit his association or authorship with the work? Yes?

6) Should the copyright protection for architectural works extend to the prohibition of making and distribution of pictures, paintings and photographs, if the building is in a place accessible to the public? NO

Ten copies of any comments should be sent by September 16, 1988 to: ~~Library of Congress~~, Department 100, Washington, D.C. 20559. The request for public comment was published in the Federal Register on June 8 (53 FR 21536). For further information, contact William Patry, Policy Planning Advisor to the Register of Copyrights, Copyright Office, Washington, D.C. 20559. Telephone (202) 287-8350.

Any comments received by the Copyright Office will be considered. All to often, only a few comments are submitted. Recently, the Copyright Office held hearings concerning copyright registration of computer display screens. Only 35 comments were submitted.

For a free copy of the Federal Register notice which contains 13 detailed areas of interest to the Copyright Office, or for further information, contact Michael H. Minns, 953-0722.

Robert J. Bresse Asso. Inc., Architects

1-216-349-0710

PATENT • TRADEMARK • COPYRIGHT

UNIVERSITY OF SOUTH CAROLINA
COLUMBIA, S.C. 29208

SCHOOL OF LAW

OFFICE OF REGISTER
OF COPYRIGHT
SEP 1 5 1988
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To: Library of Congress
Copyright Office
Department 100
Washington, D.C. 20540

From: Professor David E. Shipley
University of South Carolina
School of Law
Columbia, South Carolina 29208

Date: September 10, 1988

Re: Response to the Copyright Office Notice of Inquiry of June 8, 1988 (53 FR 21536) Seeking Public Comment on the Scope of Protection Available for Architectural Works

I am a Professor at the University of South Carolina School of Law and I am submitting these initial comments regarding copyright protection for architectural works as an interested member of the public who has some expertise in copyright law.

I have been teaching courses in Copyright Law and Intellectual Property for eleven years and I have written several law review articles about various topics and problems in these areas. One of my articles, Copyright Protection for Architectural Works, 37 South Carolina Law Review 393 to 449 (1986), deals at some length with many of the questions raised in the Notice of Inquiry. In responding to many of those thirteen specific questions I have taken the liberty of simply attaching a copy of my article and citing the specific pages at which my position on an issue is stated and explained.

Questions 1 and 2. Particular aspects of many architectural works can be protected under copyright, unfair competition (including section 43(a) of the Lanham Act), design patent and contract law but the scope of protection from these several doctrines is limited; arguably there is no right to control the use of plans plus hardly any elements in a finished structure are protectible. For instance, as explained on pages 395 to 396 of my article, there is little question that copyright protects blueprints from being reproduced (ie., copy them to make another set of blueprints) but beyond that limited right very little is certain. Similarly, an architect's contract with a client and/or a builder should be binding on those parties but it will not offer much protection

The University of South Carolina: USC Aiken; USC Salkehatchie, Allendale; USC Beaufort; USC Columbia; Coastal Carolina College, Conway; USC Lancaster; USC Spartanburg; USC Sumter; USC Union; and the Military Campus.

against a third person who wants an exact duplicate of the building which was designed and constructed pursuant to that contract. In my opinion, it does not make sense to afford so little copyright protection to architects. They are as much authors as sculptors and dramatists yet their works of authorship receive very little protection under the laws of the United States. *See* 394 and 448-49.

Question 3. In my opinion architects should not only have the exclusive right to control the reproduction, adaptation and distribution of their plans (*see* pages 400-01), but also the right to control use of those plans (a right to build, *see* 410 to 417) plus copyright protection should extend to the externally and internally conceptually separable design elements of the finished building originally depicted in the plans -- in essence, many aspects of the completed structure should be protected by copyright (*see* pages 428 to 431). In my opinion, section 102(b) of the Act, and the idea/expression dichotomy announced over a century ago in *Baker v. Selden*, are not obstacles to this expanded form of protection. *See* my discussions at pages 413 to 417, 429 to 431, and 444 to 448.

Question 4. All architects can use classical and other public domain designs and design elements. They are like stock characters and basic plots -- concepts and ideas that are in the public domain and free for all to use. *See* page 445. After all, we allow substantial borrowing in other arts, such as literature, music, and painting, so it should be allowed with architecture. When, however, an architect's copyrightable combination of these unprotectible design elements (ideas) is copied or used without his or her permission, that should constitute infringement.

Question 5. If copyright protection is extended to buildings and structures, the test for infringement should be the traditional one of the copyright owner having to prove copying and substantial similarity of protected expression. The copying and/or use of plans without the architect/copyright owner's permission should be infringement and in those circumstances it is likely that the defendant's finished structure will be substantially similar to the plaintiff's structure. Infringement would, however, be more difficult to prove when the plaintiff cannot establish the copying or use of his or her plans. As explained on pages 446-48, it then would be necessary for the architect/plaintiff to prove that the defendant copied protectible aspects of his building. With some simple structures the substantial similarity of protected expression test would not be satisfied unless the copying amounted to almost verbatim reproduction of the entire structure. On the other hand, even if two structures do not appear to be similar from the outside, courts should not hesitate to find infringement when copying is established and the plaintiff shows that the internal plans of the two structures are substantially similar. In addition, if an architect/plaintiff can establish that the defendant copied his structure and that he copied more than just its unprotectible elements such as its basic style, but protectible expression, then the total concept and feel test could be applied.

Question 6. An infringement claim will be difficult to prove when the copyright owner/architect cannot show copying of his plans, elevations or models. Nevertheless, if he can show that the defendant had access to his structure -- that he had seen it and walked through it -- and that there are substantial similarities between the the defendant's structure and his building, then he should be able to recover for copyright infringment. See pages 446-47. Appropriate relief would ordinarily be a monetary award based on the plaintiff's damages (the plaintiff lost the fee or commission which he would have charged had he been hired to design the structure in question), the defendant's profits, or a combination of the two. In some circumstances, a court might order the defendant to alter aspects of the design of an infringing uncompleted structure so that it would not appear to be similar to the plaintiff's building when it is finished, but injunctive relief requiring the destruction of completed or uncompleted buildings should not be granted. See Nucor Corp. v. Tennessee Forging Steel Servs., Inc., 476 F.2d 386, 390-93 (8th Cir. 1973).

Question 7. Absent recognition of moral rights in the United States, the owner of intellectual property rights in an architectural work who conveys all of those rights to another should not have the right to prohibit alterations to the work. However, the architect/creator might be able to protect that interest by reserving control over alterations in the contract or agreement by which he conveys his rights. Protection also might be available to some extent by retaining the right to prepare derivative works.

Question 8. Many creative people, not just architects, would like to prohibit the association of their names with works which, although originally their own creations, had been altered without their consent. At present, this interest -- an aspect of moral rights -- can be protected by contract, assuming the creator has bargaining power. Legislative action would, however, be necessary for full protection and I do not see significant risks from granting this sort of paternity right to all authors of copyrightable works, not just architects.

Question 9. For the sake of uniformity, the term of protection for architectural works should be same as the term for all other copyrightable works; the standard "life of the author plus 50 years" period as well as the variations applicable to works for hire and so on. I do not think that there are any "significant" policy reasons supporting a shorter or longer term. In regard to preemption of state law, if architectural works are granted full copyright protection then section 301 of the Copyright Act, with all of its ambiguities and nuances, should apply to state law claims involving such works in the same manner it applies to state law claims dealing with other works which come within the subject matter of copyright.

Question 10. In several European countries architectual copyright is not infringed by the making and publishing of a photograph or other pictorial representation of a building (see page 444 of my article). That limitation on the copyright owner's rights should be adopted here through recognition in, or application of, the fair use doctrine codified at section 107 of the Act. The fair use doctrine should be utilized instead of a specific limitation because some noncommercial, as well as purely commercial, uses of a photograph or other representation of a structure might damage the copyright owner plus it is difficult to distinguish between commercial and noncommercial uses.

Question 11: The initial owner of intellectual property rights in a protected work of architecture should be the architect who designed the structure or the architectural firm for whom he or she works. The client or commissioning party might give the architect some ideas for the building but ideas are not protectible plus it is the architect who gives those ideas copyrightable expression. Furthermore, architects ordinarily are independent contractors, not employees. If the client wants to own the copyright to the work prepared for him, then he should bargain for it and get a written assignment from the architect. In general, our copyright law's several common law and statutory doctrines on ownership can easily and effectively be applied to resolve questions of copyright ownership which arise between client and architect. See, e.g., Meltzer v. Zoller, 520 F. Supp. 847 (D.N.J. 1981)(architect holds copyright, not client); Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Construction, 542 F. Supp. 252 (D. Neb. 1982)(architectural firm holds copyright -- court concluded that the architectural firm was an independent contractor and not the defendant's employee so the work-for-hire doctrine did not apply plus it determined that the defendant could not claim an ownership interest under the Act's joint authorship provisions).

Question 12: To a limited extent, some of the perceived deficiencies with the protection now afforded to works of architecture can be resolved by contract between architect and client. However, many architects probably are not in a position to bargain for such concessions from their clients. It would be better, and more in keeping with the way the Copyright Act treats most creators of copyrightable works, to grant full protection for architectural works and to require the client/user of the protected work to have to bargain with his architect for releases of particular rights within the copyright bundle. For instance, the purchaser of an original work of art like a painting is not able to modify that work or reproduce it in copies unless he or she has permission from the creator/copyright owner. It should not be any different for architectural works. If the client wants to be able to make significant modifications in the plans or in the completed structure, or if he or she wants to be able to reproduce the plans in copies, then the client should have to bargain with the architect/copyright owner for permission to do these things.

Question 13: Other than what is discussed on pages 443 to 444 in my article, I am not current on foreign practices with regard to architectural works. Nevertheless, the fact that several countries have been affording relatively full copyright protection to architectural works for many years arguably shows that there are no significant risks or problems which result from treating architectural works like other works of authorship and affording architects as much protection as artists, authors, composers and sculptors. In essence, foreign practices are very relevant and we should analyze the French, West German, Italian and British experiences in granting protection to works of architecture.

If any of these comments are ambiguous or incomplete, please do not hesitate to contact me a (803) 777-6917 or 777-4155.

Respectfully submitted,

David Shipley

David E. Shipley
Professor of Law

Comment Letter
RM 88-4
No. 9

MARK K. GILLIGAN
Structural Engineer
1327 Blake Street
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(415) 548-8017

OFFICE OF REGISTER
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SEP 16 1988
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September 14, 1988

Mr. William Patry
Policy Planning Advisor
Copyright Office
Library of Congress
Washington, D.C., 20559

Dear Mr. Patry

I have become aware of your study regarding the scope of copyright protection for works of Architecture and would like to offer come comments. As I understand it some of the questions is should the copyright protection prevent the construction of the building with the Architectural plans, and should the copyright owner have the right to require or demand the destruction of the infringing building.

Since in many instances Civil and Structural Engineers prepare drawings for buildings without an Architects involvement, it should be made clear that any protection should not be limited to Architects. Furthermore my comments are limited to those cases where there is a clear potential of financial loss and does not address the cases where the copying is done by somebody who viewed the building from the street.

A key issue is that whenever the building is copied the Engineer and Architect of record have a definite liability when there are problems with the building that result in injury or financial loss. While the contract with the building owner can potentially limit this liability, such a contract does not eliminate the expense of litigation nor more importantly does such a contract apply to third parties. In addition, while a contract with the Owner may limit the Designers liability it is of little value in the very likely event that the liability exceeds the assets of the Owner, and or the value of the building. This situation can very easily occur in the case where there is a severe injury in a single family residence.

It should be noted that the construction process often identifies problems during construction that are often corrected without necessarily revising the drawings. Thus it is very likely that the drawings may not totally reflect the construction of the original building. Thus if the drawings are improperly reused, the copy may have deficiencies that the designer has no way to correct.

Comment Letter

RM 88-4

No. 5

September 16, 1988

POSITION PAPER:
RESPONSE TO COPYRIGHT OFFICE NOTICE OF INQUIRY ON ARCHITECTURAL WORK PROTECTIONS

To: Office of Register of Copyrights
Copyright Office
Washington, D.C.
c/o Library of Congress
Department 100
Washington, D.C. 20540

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SEP 19 1988
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Respectfully Submitted:

By: G. William Quatman, Esq., AIA
for himself and on behalf of the law firm of
Hartigan & Yanda, P.C.
406 Plaza Center Building
800 West 47th Street
Kansas City, Missouri 64112
(816) 756-2566

and

By: Mark E. Brown, Esq.
for himself and on behalf of the law firm of
Litman, Mc Mahon and Brown
1215 Commerce Trust Building
922 Walnut
Kansas City, Missouri 64106
(816) 842-1587

- - - - - - - - - - - - - - - - -

Mr. Quatman is licensed architect and an attorney representing several architectural firms in Kansas City

Mr. Brown holds a degree in architecture and practices patent and copyright law in Kansas City

On June 8, 1988, the U.S. Copyright Office issued a Notice of Inquiry on Architectural Works Protections, inviting comments from architects, builders and contractors and interested members of the public on the status of copyright protection. The Copyright Office seeks comment in three areas:

a. the type of copyright and other forms of protection currently accorded works of architecture and works related to architecture;

b. the need, if any, for protection beyond that now available (including whether perceived deficiencies are capable of resolution through private consensual (contract) arrangements); and

c. the laws and actual practice of foreign countries in protecting works of architecture and works related to architecture.

This Position Paper will address the first two areas of inquiry alone since practice of architecture in the United States is of primary concern and information on the laws of foreign countries is too broad a topic to be adequately researched and addressed.

I. WORKS OF ARCHITECTURE AND RELATED WORKS SUBJECT TO PROTECTION

The "works" of architecture for which architects may desire protection consist of the following:

1. Specifications (written requirements for materials, equipment, construction systems, standards and workmanship on a building).

2. Preliminary Drawings (including schematic drawings, sketches, preliminary drafts of building and site plans, elevations, diagrams, etc.).

3. Construction Drawings (the final set of "working drawings", i.e. plans, elevations, sections, details, site plans, utilized for construction purposes, including blueprints).

4. Renderings (interior and exterior perspectives, sketches, colored or shaded plans and elevations).

5. Models (physical scaled models of buildings, sites, or portions thereof).

6. Computer data and programs (for designing, drafting, 3-D modeling, etc.).

7. Buildings (the actual building itself, as constructed from the architect's copyrighted plans and specifications).

8. Photographs of the building, taken by the architect or the owner, or their employees or agents.

9. Ornamental Building details (ornamental elements of the design, including particular shapes or configurations, or combinations of materials).

10. Technical Building details (technical details of construction, non-ornamental elements, purely utilitarian).

It is the position of the authors of this Paper that pictorial, graphic or three dimensional representations of a building or structure as described in items 1 through 9, as original works of architecture, should be available for protection under laws of the United States. Due to the common practice of, and need for, adaption and reuse of standard or innovative technical construction details, we do not support protection of technical details under copyright law.

II. THE NEED FOR PROTECTION OF ARCHITECTURAL WORKS

Architects are usually retained by their clients under one of the two following sets of circumstances:

a. Stock designs. The client has seen a house, building, or portions of the same (including previous works by the architect or another), either in photographs or actually constructed, and the client wants one "just like it". This may include exact duplication of the building or modification of the building to suit the client's taste, needs, budget or site and climate requirements.

b. Custom designs. The client wants a unique, custom designed building, suited to the client's own particular needs, or based on the architect's particular style and talents. An "original". One-of-a-kind. A house or office substantially different from all others. In residences and in commercial buildings, the client often wants to make a particular statement of who they are through the design of their home or office building.

Both types of clients have legitimate desires and requests of the architect. Not everyone wants, or can afford, a custom designed building. Pre-engineered buildings, or "stock" sets of house plans can be purchased from a variety of sources, generally at a lower cost than custom designs. However, for the client who wants a unique design, or has a site or need that requires a custom-tailored design, the architect is called upon to exercise his or her talents, education and training to produce a design that is substantially different from others. If the owner or architect want to allow others to reproduce that unique design, this should be permitted with appropriate permission from and/or compensation to the copyright owner. The public should not be allowed the unrestricted right to "pirate" original copyrighted architectural designs without authorization.

Copyright protection for architectural works protects the public by:

1. Encouraging innovative design and advancement in technology;
2. Encouraging variety in our cities and communities;
3. Protecting an owner's investment in the building, as a unique structure, and the value of the design, paid for by the owner.

Copyright protection of architectural works protects the design professional (architect or engineer) by:

1. Encouraging creative itegrity and innovation;
2. Protecting the designer's reputation;
3. Protecting the professional's economic interest in developing his of her business and livelihood;
4. Protecting the architect from additional liability or loss arising from design or construction defects.

Architecture, like all business, is competitive. Architects frequently compete in formal design competitions to obtain work, or to obtain professional recognition. Sometimes an owner will select several architects to submit designs in competition against each other, with the winner being awarded the contract to complete design for the project. Other competitions consist of designs, both built and unbuilt, on a regional or national basis for recognition and award. These competitions are sponsored by industry associations and societies (such as the AIA, American Concrete Institute), magazines (such as Architectural Record, Progressive Architecture), manufacturers (such as Reynolds Aluminum, Formica), and owners (such as the American Bar Association and others).

Whether in formal competition or not, architects base their reputation and their ability to obtain future work on the public's perception of their talent and skill, as reflected by the architect's work. While not every architect has a "signature" style of design, many architects gain success based on a unique style identified by the public with a particular architect. For these architects, the need to protect their work from being copied is great. Imagine the decrease in the value of an architect's services or the devaluation of an owner's building if anyone could obtain a "copy-cat" version of the custom designed building at a lower cost, possibly with cheaper building materials and risk to public safety. Likelihood of confusion over which architect designed the building could seriously damage an architect's reputation if the "copy" is inferior to the original.

While not duplicating the design exactly, other architects may want to copy the "style" set by design leaders, and use design elements and concepts of a building or design that have been published or which have historical value. This is encouraged in the architectural profession. Not everyone can "re-invent" the wheel with every design. But by varying the design, and utilizing elements from other buildings, an architect can improve upon a previous design. The public benefits by varied designs in the cities and communities, and by protecting the value of the owner's investment. Copyright protection of architectural works protects both the public and the architect.

III. DANGERS OF OVER PROTECTION

Because of the need to "build upon" a previous design or style, it is essential that architects not be prohibited by law from copying design elements or overall styles, seen in magazines, books or as constructed, as long as the architect does not reproduce a copyrighted drawing or book in the process, and as long as the new overall design differs substantially from the original. The improved design must not have the "total concept and feel" of the original. However, an exception must be made where technology is such that all buildings utilizing certain building materials (such as glass curtain walls) would not be deemed infringements on another if there is otherwise substantial difference between the buildings.

Many historical elements are reproduced, copied, varied rearranged in almost every design. For example, elements of the classical Greek temple have been incorporated into contemporary designs for churches, banks, residences, office and government buildings and museums. A balance needs to be achieved whereby noone can obtain a monopoly on such common elements, but only on a unique combination of those elements. Over protection could stifle design work and breed litigation. Copyright law needs to protect existing copyrighted drawings, and future copyrighted architectural works under the expanded protection outlined in Section VIII of this Paper.

IV. CURRENT PROTECTION AVAILABLE TODAY IN THE UNITED STATES

A. Copyright

The present copyright laws of the United States, 17 U.S.C. §§ 101, et seq., make no specific mention of "architectural" works or drawings. Courts have interpreted these laws to include architectural drawings alone under 17 U.S.C. § 102 (a)(5), which protects "pictorial, graphic, and sculptural works", properly copyrighted, from being reproduced. The procedure for obtaining a copyright on a drawing is quite simple, under 17 U.S.C. § 401, by placing:

1. the symbol © , or "Copyright" or "Copr."; and
2. the year of first publication; and
3. the name of the owner of the copyright.

The copyright owner may not enforce its copyright by action for infringement until the drawing has been deposited and registered with the U.S. Copyright Office and proper fees paid. 17 U.S.C. § 411. Since architecural drawings have been held not to be "works for hire" [1], the protection extends for the life of the author, plus 50 years. 17 U.S.C. § 302(a).

However, it has been held that while the drawings themselves can be protected from unauthorized reproduction, the copyright owner's rights do not include protection of the building itself. As one federal appeals court recently stated,

> "The copyright owner is vested with certain exclusive rights in the drawings as listed in 17 U.S.C § 106, including reproduction of, and preparation of derivative works therefrom 'so as to instruct a would-be builder on how to proceed to construct the dwelling pictured.' [citation omitted]. The copyrighted drawings do not, however, 'clothe their author with the exclusive right to reproduce the dwelling pictured.' [citations omitted]. The building itself has 'an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey the information,' 17 U.S.C. § 101, and as such is an useful article not susceptible to copyright. [citations omitted]. A builder who constructs a home substantially similar to a dwelling already constructed is not liable for copyright infringement merely based on the substantial similarity if he or she did not engage in unauthorized copying or use of the copyrighted architectural drawings." [2]

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[1] Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Construction Co., 542 F. Supp. 252 (D. Neb. 1982); Meltzer v. Zoller, 520 F. Supp. 847 (D.N J. 1981)

[2] Donald Frederick Evans and Assoc. v. Continental Homes, Inc, 785 F.2d 897 (11th Cir. 1986); see also Demetriades v. Nicholas Kaufmann, et al., 88 Civ. 0848 (S.D.N.Y. 1988)

The court implies that under current law, anyone may reproduce a building, and construct an exact duplicate as long as there was neither:

1. unauthorized copying of copyrighted drawings; nor
2. unauthorized use of such copyrighted drawings.

The public is currently free to photograph, measure, redraw and rebuild any building, even if the plans were properly copyrighted. This devalues the protection granted by a copyright. It further devalues the architect's reputation and livelihood, and the owner's investment in his building and design. The present law should be changed to give protection to the owner of the copyright from substantial reproduction of the design by an infringing builder, owner or designer, whether copied from drawings or from a constructed building.

The only architectural works currently afforded this type of protection are "sculptural" or "monumental" structures. As the House Report on the 1976 Copyright Act stated:

> "Purely non-functional or monumental structures would be subject to full copyright protection . . . [as] would . . . artistic sculpture or decorative ornamentation or embellishment added to a structure. On the other hand, where the only elements of shape in an architectural design are conceptually inseparable from utilitarian aspects of the structure, copyright protection for the design would not be available."

It is the position of the authors of this Paper that copyright protection should be expanded to include all architectural works, whether drawn or constructed, including all non-technical aspects of the overall structure. For each building is, in itself, a work of sculpture. It is a three dimensional work of art, recognized as such by galleries and publications which exhibit photographs and renderings of architectural works. It is not merely the photograph or the rendering which is "art". Rather, it is the building photographed or drawn. Its unauthorized reproduction and reconstruction should be prohibited.

B. Design Patents

Like copyright laws, the federal patent laws are also based on the Constitution and preempt all other laws on the same subject. A design patent is available under 35 U.S.C. § 171 to protect the ornamental appearance of a new, original and nonobvious ornamental design. Attached to this paper as Exhibit "A" are copies of some representative design patents obtained on buildings. The term of the design patent is much shorter than that available for copyrights, in that protection is limited to a term of 14 years. 35

best copy available

U.S.C. § 173. Unless there is a contract to the contrary, the patent rights generally belong to the inventor (or his employer). Design patent protection has been found applicable to architectural components, although such decisions appear to be sparse and relatively old. [3] It is the position of the authors of this Paper that design patent protection alone does not provide sufficient protection for architectural works.

C. Trademark and Unfair Competition

Unlike copyright and patent law, which are governed almost entirely by federal law, trademark and unfair competition law is governed by federal and state statutes and by various common law (i.e. arising from court cases) doctrines. Courts have recognized that certain unique commercial design configurations can function as trademarks. [4] We are all familiar with the roof shape of a Pizza Hut, Mc Donalds or Fotomat. The trademark rights in the configuration of a building generally belong to the owner of the business, because the public associates the configuration of the building with the goods or services provided by the business owner, rather than the architect. This protection does not adequately protect the noncommercial owner or the architect.

D. Consensual (Contract) Arrangements

The most widely used set of contract forms utilized in the construction industry are those published by the American Institute of Architects (AIA). The standard AIA Owner-Architect Agreement contains a provision which provides that:

1. The drawings are the property of the Architect who retains all rights to copyright;
2. the owner may retain copies for "information and reference in connection with Owner's use and occupancy of the Project"; but
3. the Owner shall not use the drawings for:
    a. other projects; or
    b. additions to this Project; or
    c. completion of the Project by others;
4. without written permission and appropriate compensation. [5]

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[3] Riter-Conley Mfg. Co. v. Aiken, 203 F. Supp. 669 (3rd Cir. 1913);

[4] See e.g. Fotomat Corp. v. Cochran, 437 F. Supp. 1231 (D. Kan. 1977);

[5] AIA Document B141, Owner/Architect Agreement, 1987 edition, Article 6.1 (Attached as Exhibit "B")

These types of contract provisions protect the copyright owner from unauthorized use of drawings only by the other party to the contract. The provision is not binding on third parties, not in privity of contract with the architect. As such, the clause offers limited protection.

It would be possible to require the Owner to indemnify the architect for damages occassioned by duplication of the structure by third parties who obtain the plans from the owner. Such clauses could also require that the Owner place a similar provision in the Owner-Contractor Agreement, prohibiting reuse by the Contractor and requiring that the Contractor indemnify the owner for damages arising from such unauthorized reuse of the drawings. However, without legislation preventing duplication of a structure, these clauses may be difficult to negotiate, and, in any event, would not be binding on the public at large. Legislation is needed to provide the necessary level of protection we deem necessary for architectural works.

V. THE NEED FOR EXPANDED PROTECTION FOR ARCHITECTURAL WORKS

There are basically three situations in which architectural works are copied. Those are:

CASE ONE: Drawings from Drawings. Where copyrighted architectural drawings are copied by another without permission. Although not expressly covered by the current Act, the courts have declared this to be an infringement, protected by law.

CASE TWO: Building from Unauthorized Use of Drawings. Use of copyrighted drawings, without permission of the owner of the copyright, to construct a building. As previously noted, this can be restricted to a certain extent by contract. However, plans come into the hands of many different parties in the course of a construction project, from building codes officials and their staff, planning and zoning boards, contractors, subcontractors, and their subs and suppliers, consultants, and others. There is no end to the number of persons who may obtain a set of blueprints and, while not engaging in any unauthorized copying, may use the blueprints to construct a duplicate structure without authorization. There is no express prohibition against this practice under current copyright law.

CASE THREE: Building from Building. Reproducing an identical building based on photographs, measuring or sketching an existing structure, which was originally built based on copyrighted plans. There is currently no protection afforded the architect of the owner to prevent "knock off" imitations of a unique architectural design or work.

It is the opinion of the authors of this Paper that greater protection than that currently available under the copyright laws is needed to protect the integrity of the design profession and the public interest in Cases Two and Three, and that U.S. laws should be brought into compliance with the Berne Convention by providing explicit protection for "architectural works", including all tangible reproduction of the design, in any medium, including building materials.

VI. LAWS AND PRACTICES OF FOREIGN COUNTRIES

Current information is insufficent, and research too entailed to report on the practices of the various foreign countries. However, many foreign countries are members of the "Berne Convention", a convention for protection of Literary and Artistic Works signed at Berne, Switzerland on September 9, 1886, as revised up to and including the Paris revision of 1971. The Berne Convention provides explicit protection for "works of architecture" and "illustrations, maps, plans, sketches and three-dimensional works relevant to architecture". A listing of the countries belonging to the Berne Convention is attached hereto as Exhibit "C". The laws of the United States should be compatible with those of the Berne Convention so as to provide ample protection to architects whether practicing in this country or abroad.

VII. COMMENTS ON SPECIFIC QUESTIONS

1. What forms of legal protection are presently available to protect works of architecture and works related to architecture?

ANSWER: See Section IV.

2. Is that protection sufficient to foster the economic and aesthetic interests of those involved in the creation and exploitation of such works?

ANSWER: No.

3. a) If not, should the creators of works of architecture and works related to architecture have the exclusive right under the Copyright Act or other forms of protection to authorize the reproduction of their works?

ANSWER: The "owner" of the copyright should have this exclusive right, not the creator. Often the creator and owner will be the architect. However, the architect may, by contract, transfer all copyright interest to another.

b) Should copyright or other forms of protection be extended to buildings or structures provided they contain externally or internally conceptually separable elements as to form or design, and if so, what test should be used to determine whether conceptual separability exists?
[Cf. Esquire v. Ringer, 591 F.2d 796 (D.C. Cir. 1978), cert. denied, 440 U.S. 908 1979; Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989 (2d Cir. 1980); Carol Barnhart, Inc. v. Economy Cover Corp., 773 F.2d 411 (2d Cir. 1985); Brandir International, Inc. v. Cascade Pacific Lumber Co., 5 U.S.P.Q. 2d 1089 (2d Cir. 1987).]

ANSWER: Yes. Buildings and structures constructed from copyrighted drawings and specifications should be protected by copyright. Current law does not provide for copyrighting of useful articles except to the extent design features can be identified separately (either physically or conceptually) from functional elements of the article. 17 U.S.C. § 101. However, courts have upheld copyrights for art which serves a functional purpose (e.g. statutes which served as lamp bases, Mazer v. Stein, 347 U.S. 201 74 S. Ct. 460 (1954); and sculpture which served as a belt buckle, Kieselstein-Cord) finding that the utilitarian aspect can be conceptually separated from the functional element. In Kieselstein-Cord, the court recognized that the belt buckles were "conceptually separable sculptural elements", since wearers use them as ornamentation as well as to hold up pants. Similarly, a building may strictly be a barn, with no degree of ornamentation, or it may be the U.S. Capitol building, with dome roof, scroll work, scultpured pediments and ornamental column capitals. It is photographed by thousands, its image printed on post cards and T-shirts. It is art. Obviously it is also an office building and meeting place, but its artistic features can be identified separately from the utilitarian features in concept. Even the barn may be considered art, as have many painters and photographers over the years. The Kieselstein-Cord case recognized that "body art" has been an art form since the earliest days of Tutankhamen. The Egytians also recognized "building art", as they painted and sculpted their tombs and temples with figurines and sphinxes. (See Egyptian temple exhibit at the Metropolitan Museum of Art in New York.) So too, modern architecture meets the basic requirements of originality and creativity to be copyrightable works. The building exists as a conceptually separable artistic sculpture capable of existing independently as a work of art, while at the same time functioning as a building. (See Frank Lloyd Wright exhibit, also at the Metropolitan Museum of Art in New York.)

c) If copyright or other forms of protection should not be extended to the buildings or structures themselves, should it be extended to prevent the construction of buildings or structures based on infringing architectural plans, drawings, elevations, or three-dimensional models; and, if so, would such a right, in practice, nevertheless result in protection of buildings or structures?

ANSWER: We believe that protection should be extended to the buildings or structures themselves, not just for "monumental" works, as long as the structure was built from copyrighted drawings. In addition, protection should extend to prevent construction based on infringing plans, drawings, elevations or models. While construction may be completed to a stage where an injunction against or destruction of construction would result in economic waste, damages should be available for infringement.

d) What is the effect of 17 U.S.C. 102(b) and Baker v. Selden, 101 U.S. 99 (1879) on such protection?

ANSWER: 17 U.S.C. § 102(b) prohibits copyright protection for any "ideas, procedure, process, system, method of operation, concept, principle, or discovery". This does not exclude protection for graphic or sculptural works which are specifically copyrightable under 17 U.S.C. § 102(a). This is compatible with the protection we feel is needed for architectural works.

As to Baker v. Selden, there is argument that the holding should not apply to architectural works. In Scholz Homes, Inc. v. Maddox, 379 F.2d 84 (6th Cir. 1967), the court stated that

Baker would seem to permit even the copying of plans. However, the court suggested that,

> "perhaps the most promising method of avoiding this difficulty is to argue that copyrighted architectural plans should be treated differently from copyrighted books, and that the principles enunciated in Baker should therefore be held inapplicable. . . .
>
> [Architectural plans] are often prepared so that they may be used in the building of unique structures, or at least structures limited in number. If the copyright statute protected merely against the vending of plans instead of against their unauthorized use, it would therefore fail to afford a form of protection architects might strongly desire. This protection would most effectively be provided by holding the unauthorized construction of a building according to a copyrighted plan to be an infringement; if Baker is followed to the extent of holding that the possession of the copyright in the plans gives no exclusive right to construct the building, then protection could be provided by declaring the making of unauthorized copies of the plans to be an infringement."

We urge that protection extend to both unauthorized copying of plans and to unauthorized construction.

e) Can a building or structure be a "copy" of architectural plans it is derived from, and if so, does it make a difference whether the building or structure itself constitutes a copyrightable work?

ANSWER: Yes. Copyright law protects infringement by reproduction of a derivative work in another medium. 17 U.S.C. § 106(2). The law should be clear that "construction" can constitute a derivative work from copyrighted plans. There needs to be protection for innocent infringers, who copy a building without knowledge of the copyright. This can be accomplished by either: a) a visible notice on the structure itself; or b) public filing in the county recorder of deeds office of a copyright notice coupled with the legal description of the property where the structure was built and copies of the plans and elevations. The building can and should be a copyrightable work.

4. What is the effect of architects' use of classical or other public domain elements such as designs that are staple, commonplace, or familiar in the industry?

ANSWER: Elements or designs which are currently in the public domain without a copyright would be available for unrestricted copying. Future unique combinations of those elements should be available for protection. All past, unprotected works would not fall within the expanded protection we recommend, so as to work no undue hardship on the public.

5. a) If protection should be granted to buildings or structures, what should the scope of that protection be?

ANSWER: The law should prevent unauthorized reproduction of a building or structure "substantially" similar to the protected building, whether built from copyrighted plans without permission or from the structure itself.

b) Should the standard for infringement of buildings or structures be the same as for traditional copyrighted works of the arts, i.e., substantial similarity?

ANSWER: Yes. What constitutes "substantial" should be a jury question, within the common knowledge of lay persons. The test currently used is whether an average lay observer would recognize the resemblance. This is known as the "ordinary observer" test. Durham Industries v. TOMY Corp., 630 F.2d 905, 911 (2d Cir. 1980).

c) How would recent decisions on the total concept and feel test apply to infringement of works of architecture?

ANSWER: The test would apply in conjunction with the ordinary observer test to find infringement where there is substantial similarity, including the "total concept and feel" of the original work. Sid & Marty Krofft v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977); Roth Greeting Cards v. United Card Co., 429 F.2d 1106 (9th Cir. 1970). An exception would have to be made where technology and building type give rise to some inherent similarity, such as international style glass high-rise office towers built in the 1960's and 1970's, which to a lay person may look substantially similar or have "the feel" of being the same.

6. a) Should the owner of the intellectual property rights in a protected work of architecture have the right to prohibit others from constructing an otherwise infringing work if those others have created their work without the aid of the original plans, drawings, elevations, or three-dimensional models, such as by viewing the protected work or by taking its measurements?

ANSWER: Yes, as long as there is substantial similarity and due notice of the copyrighted work, the design is infringed even if plans are re-created without copying the drawings.

b) Should the owner of the intellectual property rights in a protected building have the right to require destruction of completed or uncompleted buildings or structures?

ANSWER: No. Such law would result in economic waste. Monetary damages should adequately protect the copyright owner's rights and discourage infringement.

c) What would the appropriate monetary remedies be for infringement of a protected work of architecture or work related to architecture?

ANSWER: Damages should include the "fair value" of the plans, Nucor Corp. v. Tennessee Forging Steel, 513 F. Supp. 151, 153 (8th Cir, 1975), i.e. the architect's original fee for design (adjusted for inflation); plus attorney's fees; court costs; plus any profits the infringer made by virtue of duplicating the work. Punitive damages would be available only where there is proof of malice. The infringer should also be held to indemnify the architect for any damages or claims against the architect arising out of unauthorized duplication.

7. a) If the owner of the intellectual property rights in a work of architecture conveys those rights, should he or she still have the right to prohibit alterations to the work, and if so, what kind of alterations, all or only those that are not of a practical or technical nature necessary for maintenance or repair?

ANSWER: No. If the owner of those rights wants to prohibit alteration, such protection can be provided for by contract, or by the terms of the conveyance.

b) If he or she should have the right to prohibit alterations for at least those of non-utilitarian purpose or effect, and the owner of the material embodiment of the work makes unauthorized alterations, what should the available remedies be?

ANSWER: Damages for breach of contract, reasonably foreseeable at the time the contract is made. That is beyond the scope of copyright law. It becomes a matter of contract law.

c) Should the owner of the intellectual property rights in a work of architecture ever have the right to require or demand the destruction of infringing buildings or structures or to prohibit their removal from a specific site?

ANSWER: No. Although the court might order alteration of the structure to alleviate the substantial similarity.

8. Should the owner of the intellectual property rights in a protected work of architecture that has been altered without consent have the right to prohibit his or her association or authorship with the work?

ANSWER: Yes, but not by statute.

9. Assuming rights should be granted to works of architecture, how long should the term of protection be, and if federal rights are involved, including copyright, what should the extent of preemption of state law be?

ANSWER: Author's life (whether individual or corporation) plus 50 years. 17 U.S.C. § 302(a). Full preemption of state law so as to provide uniformity from state to state.

10. a) If rights were granted to works of architecture, should there be an exemption for the making, distributing or public display of pictures, paintings, photographs, or other pictorial representations if the work is located in a place accessible to the public, and if so, should the exemption be limited to noncommercial uses?

ANSWER: Yes. Buildings make up our cities. Even if buildings themselves are protected by copyright, they should be freely photographed or painted by anyone. Such artistic expression should not be prohibited by law in those mediums, as long as architectural drawings are not photographed or otherwise reproduced in violation of the copyright and as long as the building is not reconstructed based on such photographs.

b) What role would the fair use doctrine play if protection were granted?

ANSWER: Fair use doctrine has been termed among the most troublesome areas of copyright law. 2 M. Nimmer Copyright, § 145 (1976). The key issue in fair use cases is whether the infringing work tends to diminish or prejudice the potential sale of the copyright owner's work. Meereopol v. Nizer, 560 F.2d 1061 (2d Cir. 1977). 17 U.S.C. § 107 defines "fair use" as reproduction for purposes such as "criticism, comment, news reporting, teaching . . ., scholarship, or research". The factors to be considered in applying the doctrine include "the amount and substantiality of the portion used in relation to the copyrighted work as a whole" and "the effect of the use upon the potential market for or value of the copyrighted work". With these guidelines, fair use should be compatible with the expanded protection sought.

11. a) Who should the initial owner of intellectual property rights in a protected work of architecture be, and how would the work for hire doctrine in the Copyright Act affect ownership questions?

ANSWER: In absence of contract, the designing architect, unless employed by a firm or company, in which case the employer, providing the work was created in the scope and course of the designer's employment. By contract, ownership can be transferred to the owner or anyone agreeable to the architect. Since the courts have declared architectural works as not "works for hire" the doctrine would not apply.

b) How are questions of ownership of intellectual property rights in works related to architecture presently resolved?

ANSWER: Through the courts. See section IV and cases cited therein.

c) Does that system work effectively?

ANSWER: Yes, although coverage of protected works must be expanded to include all three cases listed in Section V.

d) How would the copyright concept of joint ownership operate if protection were extended to works of architecture?

ANSWER: Joint works, as defined in 17 U.S.C. § 302(b), provides protection for 50 years beyond the death of the last surviving author. We see no problem with this as applied to works of architecture. Where the copyright is owned by a partnership, protection should last for 50 years beyond the death of the last surviving partner, even if the partnership is dissolved or terminated.

12. Can private, consensual agreements resolve any perceived deficiencies with the current state of protection for works of architecture and works related to architecture?

ANSWER: No. Such agreements are limited in scope and enforcement. In absence of privity of contract, they provide no protection. See Section IV.D.

13. a) What is the nature and extent of protection granted in foreign countries to works of architecture and works related to architecture and how is that protection actually accorded in practice?

b) Are foreign practices relevant or applicable to practices in the United States?

ANSWER: Refer to the Berne Convention and Section VI of this Paper. Foreign practices are relevant. American architects often design buildings to be built in foreign countries. (E.g. I.M. Pei's design for addition to the Louvre in Paris.) Their designs are copyrightable in the foreign country, prohibiting unauthorized duplication. However, Americans may reproduce the building without penalty because of inconsistency in U.S. and foreign law. The U.S. laws should be brought into harmony with the Berne Convention.

VIII. PROPOSED LEGISLATION

insertion; [deletion]

Sec. 101. Definitions.

As used in this title, the following terms and their variant forms mean the following:

* * *

"Architectural works" include buildings and other three-dimensional structures of an original character, and works relative to architecture, such as building plans, elevations, designs, sketches, drawings, blueprints and models.

* * *

"Pictorial graphic and sculptural works" include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, technical drawings, diagrams and models, other than architectural works.

* * *

Sec. 102. Subject matter of copyright: In general

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed . . . Works of authorship include the following categories:

(1) literary works; . . .
(7) sound records [.]; and
(8) architectural works.

* * *

Sec. 119. Scope of exclusive rights in architectural works.

(a) The exclusive rights of a copyright owner in an architectural work are limmited to those rights specified in clauses (1), (2), (3), (5) and (6) of Section 106, and shall not extend to processes or methods of construction or purely utilitarian features of such works.

(b) The copyright in an architectural work does not include the right to prevent the making, distributing, or public display of pictures, paintings photographs, or other pictorial representations of the work, when the work is erected in a location accessible to the public.

(c) The owner of a copyright in an architectural work - -

(1) shall not be entitled to obtain an injunction under section 502 of this title to restrain the construction or use of an infringing building, if construction has substantially begun; and

(2) may not obtain a court order, under chapter 5 of this title, requiring that an infringing building be demolished or seized.

(d) It is not an infringement of copyright in an architectural work for the owner of a building embodying such architectural work, without the consent of the author or copyright owner, to make or authorize the making of alterations to such building, in order to enhance the utility of the building.

Conforming Amendment - - The table of sections at the beginning of such chapter is amended by adding at the end thereof the following:

"119. Scope of exclusive rights in architectural works."

Conforming Amendment - - Section 401 shall include a new section (d) as follows:

"(d) Notice for Architectural Works. In order to provide copyright protection for constructed architectural works, the owner of the copyright shall file a copy of the plans and elevations, including the Notice set forth in section (b), with the Recorder or Registrar of Deeds in the county in which the building or structure is located, and a duplicate copy with the Copyright Office, including the legal description of the property on which the work is located. Such notice must be filed before construction begins."

Conforming Amendment - - Section 106 shall include a new section (6) as follows:

"(6) in the case of architectural works, to build a structure based on architectural drawings, blueprints, diagrams or models."

United States Patent [19]

Bergquist

[11] **4,259,816**

[45] **Apr. 7, 1981**

[54] **RESTAURANT FACILITY**

[76] Inventor: Ron B. Bergquist, 1506 Blvd. at Six Corners, Sherwood, Oreg. 97140

[21] Appl. No.: 61,809

[22] Filed: Jul. 30, 1979

[51] Int. Cl.³ E04H 3/04
[52] U.S. Cl. 52/33; 52/236.1
[58] Field of Search 52/79.4, 236.1, 27, 52/33, 36

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Architectural Record, Jan. 1971, p. 86.

Primary Examiner—John E. Murtagh
Attorney, Agent, or Firm—Kolisch, Hartwell & Dickinson

[57] **ABSTRACT**

A restaurant facility housed within an enclosure bounded by upright walls defining a perimeter for an enclosure of hexagonal outline. A kitchen and service station and table and seating structure within the enclosure are so organized that there is full visibility throughout the dining area. Waiters and patrons move in corridors providing access to tables and seats which are devoid of sharp corners.

10 Claims, 3 Drawing Figures

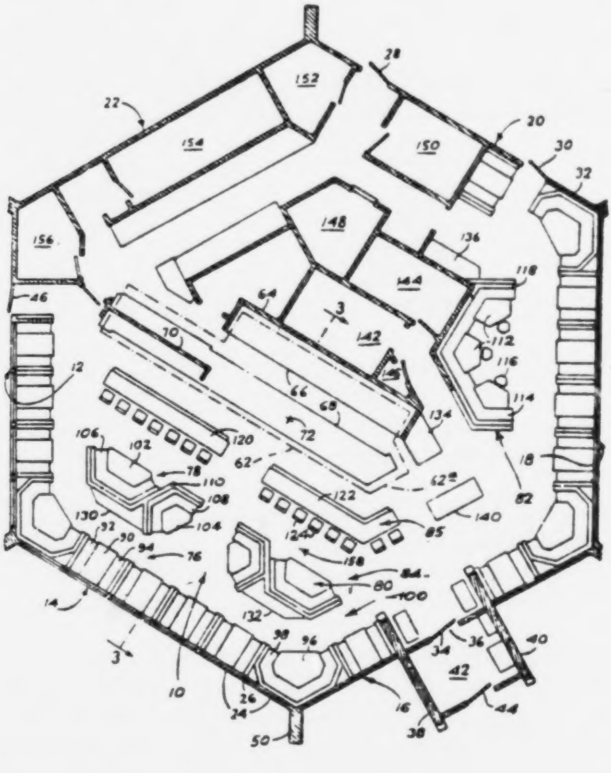
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EXHIBIT "A"

180

United States Patent [19]

Theiss

[11] **Des. 254,030**

[45] ** **Jan. 22, 1980**

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[54] **FOOD SERVICE BUILDING**

[76] Inventor: Sylvester E. Theiss, 1122 Parkhaven Dr., Richardson, Tex. 75080

[**] Term: 14 Years

[21] Appl. No.: 788,906

[22] Filed: Apr. 18, 1977

[51] **Int. Cl.** .... D25—03

[52] **U.S. Cl.** D25/25; D25/22; D25/23

[58] **Field of Search** 52/79.1; D25/1, 17, D25/18, 22, 23, 25, 33

[56] **References Cited**

U.S. PATENT DOCUMENTS

D. 210,448	3/1968	Burns et al.	D25/25
D. 216,683	3/1970	Gilbert	D25/25 X
D. 224,291	7/1972	Schwartz	D25/25

Primary Examiner—A. Hugo Word

Attorney, Agent, or Firm—Warren H. Kintzinger

[57] **CLAIM**

The ornamental design for a food service building, substantially as shown and described.

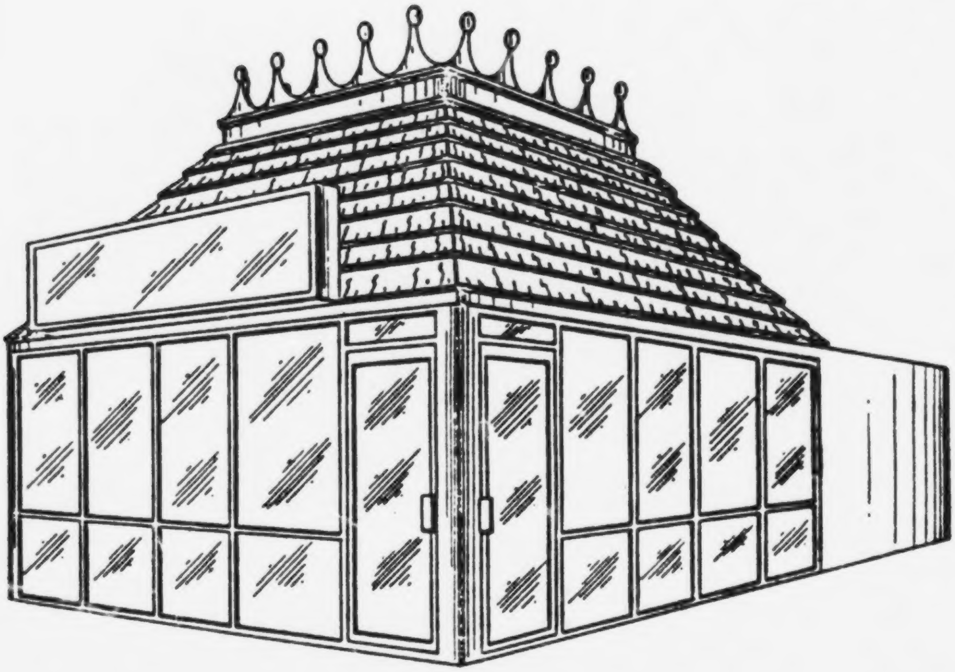
DESCRIPTION

FIG. 1 is a right front perspective of my new food service building design;

FIG. 2, is a left side-front perspective view thereof on a reduced scale;

FIG. 3, a rear perspective view; and

FIG. 4, a top plan view of the new food service building design.



United States Patent [19]

McKinney

[11] **Des. 264,250**

[45] ** **May 4, 1982**

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[54] **HOUSE**

[76] Inventor: Henry J. McKinney, 133 Brookline St., Chestnut Hill, Mass. 02167

[**] Term: **14 Years**

[21] Appl. No.: **72,155**

[22] Filed: **Sep. 4, 1979**

[51] **Int. Cl.** .... **D25—03**

[52] **U.S. Cl.** **D25/22; D25/34**

[58] **Field of Search** D25/17, 18, 22, 23, D25/24, 25, 26, 29, 30, 32, 33, 34

[56] **References Cited**

U.S. PATENT DOCUMENTS

D. 193,422 8/1962 Scholz .... D25/22 X
D. 196,496 10/1963 Graybar et al. D25/17
D. 220,035 3/1971 **Sauder** D25/25
D. 251,801 5/1979 **Gschwandtner** D25/17

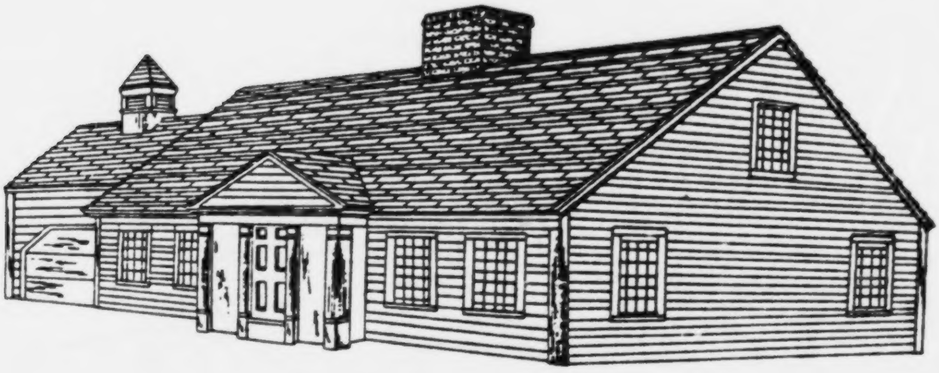
Primary Examiner—A. Hugo Word
Attorney, Agent, or Firm—Blodgett & Blodgett

[57] **CLAIM**

The ornamental design for a house, as shown.

DESCRIPTION

FIG. 1 is a front perspective view of the house,
FIG. 2 is a rear perspective view of the house,
FIG. 3 is a front elevational view of the house,
FIG. 4 is a rear elevational view of the house,
FIG. 5 is a top plan view of the house,
FIG. 6 is a left-hand side elevational view of the house, and
FIG. 7 is a right-hand side elevational view of the house.



182

United States Patent [19]

Broudy

[11] **Des. 254,032**

[45] **** Jan. 22, 1980**

[54] **STORE FRONT**

[75] Inventor: **Charles E. Broudy**, Narberth, Pa.

[73] Assignee: **Hart Schaffner & Marx**, Chicago, Ill.

[**] Term: **14 Years**

[21] Appl. No.: **816,518**

[22] Filed: **Jul. 18, 1977**

[51] **Int. Cl.** .... D25—02

[52] **U.S. Cl.** D25/59; D25/33; D25/49

[58] **Field of Search** D25/59, 58, 60, 61, D25/33, 48, 49

[56] **References Cited**

U.S. PATENT DOCUMENTS

D. 82,150	9/1930	**Hagopian**	D25/59
D. 83,097	1/1931	**Elias**	D25/59
D. 107,242	11/1937	**Kuebler**	D25/59
D. 113,503	2/1939	**Brockstein**	D25/59
D. 120,788	5/1940	**Rigaumont**	D25/59
D. 172,071	4/1954	**Wein**	D25/59

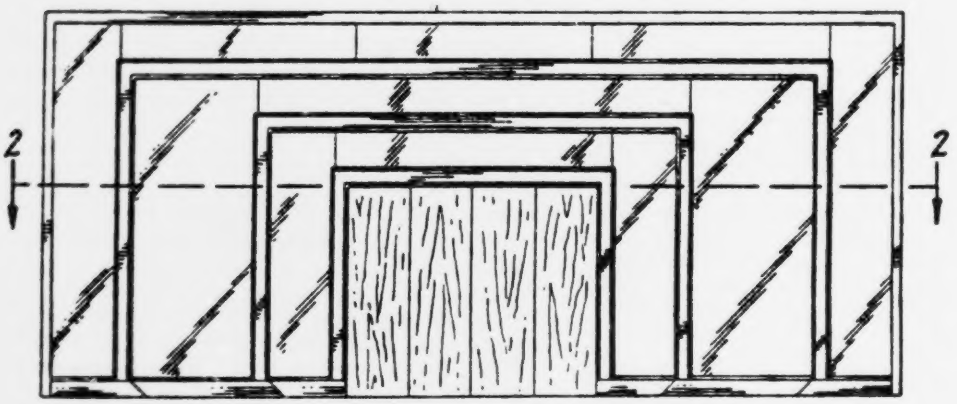
Primary Examiner—A. Hugo Word
Attorney, Agent, or Firm—James B. Kinzer

[57] **CLAIM**

The ornamental design for a store front, as shown.

DESCRIPTION

FIG. 1 is a front elevational view of a store front; and FIG. 2 is a cross-sectional view taken along lines 2—2 of FIG. 1.



ARTICLE 5

CONSTRUCTION COST

5.1 DEFINITION

5.1.1 The Construction Cost shall be the total cost or estimated cost to the Owner of all elements of the Project designed or specified by the Architect.

5.1.2 The Construction Cost shall include the cost at current market rates of labor and materials furnished by the Owner and equipment designed, specified, selected or specially provided for by the Architect, plus a reasonable allowance for the Contractor's overhead and profit. In addition, a reasonable allowance for contingencies shall be included for market conditions at the time of bidding and for changes in the Work during construction.

5.1.3 Construction Cost does not include the compensation of the Architect and Architect's consultants, the costs of the land, rights-of-way, financing or other costs which are the responsibility of the Owner as provided in Article 4.

5.2 RESPONSIBILITY FOR CONSTRUCTION COST

5.2.1 Evaluations of the Owner's Project budget, preliminary estimates of Construction Cost and detailed estimates of Construction Cost, if any, prepared by the Architect, represent the Architect's best judgment as a design professional familiar with the construction industry. It is recognized, however, that neither the Architect nor the Owner has control over the cost of labor, materials or equipment, over the Contractor's methods of determining bid prices, or over competitive bidding, market or negotiating conditions. Accordingly, the Architect cannot and does not warrant or represent that bids or negotiated prices will not vary from the Owner's Project budget or from any estimate of Construction Cost or evaluation prepared or agreed to by the Architect.

5.2.2 No fixed limit of Construction Cost shall be established as a condition of this Agreement by the furnishing, proposal or establishment of a Project budget, unless such fixed limit has been agreed upon in writing and signed by the parties hereto. If such a fixed limit has been established, the Architect shall be permitted to include contingencies for design, bidding and price escalation, to determine what materials, equipment, component systems and types of construction are to be included in the Contract Documents, to make reasonable adjustments in the scope of the Project and to include in the Contract Documents alternate bids to adjust the Construction Cost to the fixed limit. Fixed limits, if any, shall be increased in the amount of an increase in the Contract Sum occurring after execution of the Contract for Construction.

5.2.3 If the Bidding or Negotiation Phase has not commenced within 90 days after the Architect submits the Construction Documents to the Owner, any Project budget or fixed limit of Construction Cost shall be adjusted to reflect changes in the general level of prices in the construction industry between the date of submission of the Construction Documents to the Owner and the date on which proposals are sought.

5.2.4 If a fixed limit of Construction Cost (adjusted as provided in Subparagraph 5.2.3) is exceeded by the lowest bona fide bid or negotiated proposal, the Owner shall:

.1 give written approval of an increase in such fixed limit;

.2 authorize rebidding or renegotiating of the Project within a reasonable time;

.3 if the Project is abandoned, terminate in accordance with Paragraph 8.3; or

.4 cooperate in revising the Project scope and quality as required to reduce the Construction Cost.

5.2.5 If the Owner chooses to proceed under Clause 5.2.4.4, the Architect, without additional charge, shall modify the Contract Documents as necessary to comply with the fixed limit, if established as a condition of this Agreement. The modification of Contract Documents shall be the limit of the Architect's responsibility arising out of the establishment of a fixed limit. The Architect shall be entitled to compensation in accordance with this Agreement for all services performed whether or not the Construction Phase is commenced.

ARTICLE 6

USE OF ARCHITECT'S DRAWINGS, SPECIFICATIONS AND OTHER DOCUMENTS

6.1 The Drawings, Specifications and other documents prepared by the Architect for this Project are instruments of the Architect's service for use solely with respect to this Project and, unless otherwise provided, the Architect shall be deemed the author of these documents and shall retain all common law, statutory and other reserved rights, including the copyright. The Owner shall be permitted to retain copies, including reproducible copies, of the Architect's Drawings, Specifications and other documents for information and reference in connection with the Owner's use and occupancy of the Project. The Architect's Drawings, Specifications or other documents shall not be used by the Owner or others on other projects, for additions to this Project or for completion of this Project by others, unless the Architect is adjudged to be in default under this Agreement, except by agreement in writing and with appropriate compensation to the Architect.

6.2 Submission or distribution of documents to meet official regulatory requirements or for similar purposes in connection with the Project is not to be construed as publication in derogation of the Architect's reserved rights.

ARTICLE 7

ARBITRATION

7.1 Claims, disputes or other matters in question between the parties to this Agreement arising out of or relating to this Agreement or breach thereof shall be subject to and decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise.

7.2 Demand for arbitration shall be filed in writing with the other party to this Agreement and with the American Arbitration Association. A demand for arbitration shall be made within a reasonable time after the claim, dispute or other matter in question has arisen. In no event shall the demand for arbitration be made after the date when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statutes of limitations.

7.3 No arbitration arising out of or relating to this Agreement shall include, by consolidation, joinder or in any other manner, an additional person or entity not a party to this Agreement,

EXHIBIT "B"

Berne Convention—List of Ratifications as of January 1, 1987

State	Date on which membership in Berne took effect	Latest Act by which the State is substantively bound and date on which the ratification of or accession to such Act became effective
Argentina	June 10, 1967	Brussels: June 10, 1967
Australia	April 14, 1928	Paris: March 1, 1978
Austria	October 1, 1920	Paris: August 21, 1982
Bahamas	July 10, 1973	Brussels: July 10, 1973
Barbados	July 30, 1983	Paris: July 30, 1983
Belgium	December 5, 1887	Brussels: August 1, 1951
Benin	January 3, 1961	Paris: March 12, 1975
Brazil	February 9, 1922	Paris: April 20, 1975
Bulgaria	December 5, 1921	Paris: December 4, 1974
Burkina Faso	August 19, 1963	Paris: January 24, 1976
Cameroon	September 21, 1964	Paris: October 10, 1974
Canada	April 10, 1928	Rome: August 1, 1931
Central African Republic	September 3, 1977	Paris: September 3, 1977
Chad	November 25, 1971	Brussels: November 25, 1971
Chile	June 5, 1970	Paris: July 10, 1975
Congo	May 8, 1962	Paris: December 5, 1975
Costa Rica	June 10, 1978	Paris: June 10, 1978
Cyprus	February 24, 1964	Paris: July 27, 1983
Czechoslovakia	February 22, 1921	Paris: April 11, 1980
Denmark	July 1, 1903	Paris: June 30, 1979
Egypt	June 7, 1977	Paris: June 7, 1977
Fiji	December 1, 1971	Brussels: December 1, 1971
Finland	April 1, 1928	Brussels: January 28, 1963
France	December 5, 1887	Paris: October 10, 1974
Gabon	March 26, 1962	Paris: June 10, 1975
German Democratic Republic	December 5, 1887	Paris: February 18, 1978
Germany, Federal Republic of	December 5, 1887	Paris: October 10, 1974
Greece	November 9, 1920	Paris: March 8, 1976
Guinea	November 20, 1980	Paris: November 20, 1980
Holy See	September 12, 1935	Paris: April 24, 1975
Hungary	February 14, 1922	Paris: October 10, 1974
Iceland	September 7, 1947	Rome: September 7, 1947
India	April 1, 1928	Paris: May 6, 1984
Ireland	October 5, 1927	Brussels: July 5, 1959
Israel	March 24, 1950	Brussels: August 1, 1951

EXHIBIT "C"

State	Date on which membership in Berne took effect	Latest Act by which the State is substantively bound and date on which the ratification of or accession to such Act became effective
Italy	December 5, 1887	Paris: November 14, 1979
Ivory Coast	January 1, 1962	Paris: October 10, 1974
Japan	July 15, 1899	Paris: April 24, 1975
Lebanon	September 30, 1947	Rome: September 30, 1947
Libya	September 28, 1976	Paris: September 28, 1976
Liechtenstein	July 30, 1931	Brussels: August 1, 1951
Luxembourg	June 20, 1888	Paris: April 20, 1975
Madagascar	January 1, 1966	Brussels: January 1, 1966
Mali	March 19, 1962	Paris: December 5, 1977
Malta	September 21, 1964	Rome: September 21, 1964
Mauritania	February 6, 1973	Paris: September 21, 1976
Mexico	June 11, 1967	Paris: December 17, 1974
Monaco	May 30, 1889	Paris: November 23, 1974
Morocco	June 16, 1917	Brussels: May 22, 1952
Netherlands	November 1, 1912	Paris: January 30, 1986
New Zealand	April 24, 1928	Rome: December 4, 1947
Niger	May 2, 1962	Paris: May 21, 1975
Norway	April 13, 1896	Brussels: January 28, 1963
Pakistan	July 5, 1948	Rome: July 5, 1948
Philippines	August 1, 1951	Brussels: August 1, 1951
Poland	January 28, 1920	Rome: November 21, 1935
Portugal	March 29, 1911	Paris: January 12, 1979
Romania	January 1, 1927	Rome: August 6, 1936
Rwanda	March 1, 1984	Paris: March 1, 1984
Senegal	August 25, 1962	Paris: August 12, 1975
South Africa	October 3, 1928	Brussels: August 1, 1951
Spain	December 5, 1887	Paris: October 10, 1974
Sri Lanka	July 20, 1959	Rome: July 20, 1959
Surinam	February 23, 1977	Paris: February 23, 1977
Sweden	August 1, 1904	Paris: October 10, 1974[3]
Switzerland	December 5, 1887	Brussels: January 2, 1956
Thailand	July 17, 1931	Berlin: July 17, 1931
Togo	April 30, 1975	Paris: April 30, 1975
Tunisia	December 5, 1887	Paris: August 16, 1975
Turkey	January 1, 1952	Brussels: January 1, 1952
United Kingdom	December 5, 1887	Brussels: December 15, 1957
Uruguay	July 10, 1967	Paris: December 28, 1979
Venezuela	December 30, 1982	Paris: December 30, 1982
Yugoslavia	June 17, 1930	Paris: September 2, 1975
Zaire	October 8, 1963	Paris: January 31, 1975
Zimbabwe	April 18, 1980	Rome: April 18, 1980

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Comment Letter
RM 88-4
No. 6

September 16, 1988

OFFICE OF REGISTER
OF COPYRIGHT
SEP 19 1988
RECEIVED

Hon. Ralph Oman
Register of Copyrights
Copyright Office
Washington, D.C. 20559

Re: Docket No. RM 88-4

Dear Mr. Oman:

On behalf of the American Institute of Architects ("AIA"), we hereby respond to the Copyright Office's Notice of Inquiry contained in the Federal Register of June 8, 1988.

The AIA is the professional association of architects in the United States. It has more than 53,000 members, more than three-quarters of whom are licensed architects, with the balance consisting of persons either employed in a professional or technical capacity by a licensed architect or who have degrees in architecture and are not yet licensed. Approximately two-thirds of all practicing architects in the United States are AIA members.

Architectural firms tend to be smaller than law or accounting firms, and much of the architectural work done in the United States today is done by very small firms. For example, 62% of all firms have fewer than 5 employees (including non-architects) and 63% of all firms have only 1 architect working in them. More firms are organized as individual proprietorships than as partnerships and corporations combined, and more than half of all 1986 revenues were earned in firms having staffs of fewer than 20.

Most architects give little thought to copyright matters because their work receives only partial protection. From the perspective of the architectural community, rights in plans and drawings should include the right to authorize the construction of the buildings depicted therein. Architects attempt, through contracts with their clients, to control who reaps the economic benefit from their works. These contracts are reinforced by a long-recognized custom of the industry that reserves to architects the ownership of both the tangible copies of the plans, drawings, models and other graphic or three-dimensional works they create, and all rights in the intellectual property contained therein. Because contractual terms generally bind only parties to a contract, this "contract-custom" system provides insufficient rights as against third parties.

As recognized in the Notice of Inquiry, litigation concerning allegations of copyright infringement with respect to various works related to architecture[1] has occurred from time to time. More recently, the Congress has, as part of its endeavor to make United States law compatible with the provisions of the Berne Convention for the Protection of Literary and Artistic Works (Paris text, 1971), drafted several bills and reported certain legislation that would, to varying extents, change or clarify the scope of copyright protection in works related to architecture.

With respect to Berne-implementing legislation, the AIA has submitted informal comments to the Senate Judiciary Subcommittee on Patents, Copyrights and Trademarks and has testified at hearings before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee. In each instance, the AIA took the position that copyright protection for buildings and structures, as "works of architecture," under the terms of Article (2)(1) of the Berne Convention, was undesirable. That remains the position of AIA, as is reflected in the answers set out below. AIA's position on this issue is not, however, shared by all its members. Some believe that buildings and structures should themselves be fully copyrightable. AIA recognizes the validity of this position, but does not now endorse it.

On the other hand, AIA, with the full support of its membership, believes that copyright protection for works related to architecture should render the unauthorized execution of such works in the construction of a building an infringement of that copyright. This position is not AIA's alone, but is reflected in recent scholarly literature about copyright for architecture. See, Shipley, Copyright Protection for Architectural Works, 37 S.Car. L.Rev. 393 (1986) and Brainard, Innovation and Imitation: Artistic Advance and the Legal Protection of Architectural Works, 70 Cornell L. Rev. 81 (1984).

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[1] To avoid the sometimes ambiguous terminology concerning architects' works that one sees in treaties, proposed legislation, and elsewhere, this letter speaks only in terms of (a) "works related to architecture," which include all products of the architect's art except buildings and structures; and (b) "buildings and structures."

RESPONSES TO COPYRIGHT OFFICE QUESTIONS

1. The most important forms of protection for AIA members are copyright, as it now exists, with respect to works related to architecture, and contractual arrangements among architects, their clients (generally the owners of real property), contractors, and others involved with a building's creation. Each of these is of only limited effectiveness. The cases set out in the Notice of Inquiry demonstrate that present copyright doctrine protects only against the copying or adaptation of works related to architecture, and contractual language is most effective between parties in privity with one another.

For most architects, the utility of trade dress or service mark protection is non-existent. See, e.g., Demetriades v. Kaufmann, 680 F.Supp. 658, 667 (S.D.N.Y. 1988). Apart from franchised businesses such as photography or hamburger shops, there is little in a building's design to create any designation of source in the mind of the public, and in those few cases where there has been, it has been the architect's client's rights that have arguably been infringed.

The possibility of trademark protection for the architect's name has been raised in the Demetriades litigation, 1988 U.S. Dist. LEXIS 3634 at 8 (August 3, 1988) (plaintiffs granted extension to replead newly asserted trademark claim after failing to prevail on trade dress claim alleging distinctiveness of architect's design), but seems unlikely to have value in most instances.

2. The AIA has no basis for evaluating the sufficiency of the copyright system for anyone except architects; with respect to them it is clear that the present system affords some protection to works related to architecture, and a significant quantity of such works are produced. At the same time, an architect's rights in his/her creative works are unnecessarily constrained by lack of clear control over the construction of the buildings depicted therein, particularly by persons with whom the architect has no contractual relationship.

3. For the most part the creators of works related to architecture already have the exclusive right under the Copyright Act to authorize the reproduction in copies of such works. The

AIA does not now support the extension of copyright protection to buildings or structures themselves (beyond that currently granted to conceptually severable artistic elements) but does believe that protection for the drawings and plans should extend to prevent the construction, from such drawings and plans, of buildings or other structures without permission.

This would not result, as a practical matter, in protection of the buildings or structures themselves, because the offending act would be construction from copies of the copyrighted plans, and not merely the erection of a substantially similar building. Treatment of construction from copyrighted plans as infringing is simply a modest extension of the protection already afforded to works related to architecture and not, directly or indirectly, a new right in buildings themselves. Time-honored practices of making "measured drawings"[2] from others' buildings and borrowing design elements (except conceptually severable copyrighted works) would be unaffected; competitors would only be barred from constructing a new building from others' copyrighted plans.

This need not be seen as a significant break with United States copyright tradition, inasmuch as:

- The 1909 Copyright Act expressly granted the owner of copyright in a model or design for a work of art (§ 5(g)) the right to "complete, execute, and finish it . . . ." (§ 1(b)),
- § 113(b) of the current law provides for reference to that prior law to avoid the diminution [by reference to the current law alone] of rights in the making of useful articles portrayed in graphic works, and
- To the extent that current law does not protect against the embodiment of plans in buildings, this does not represent fully developed congressional policy. Nowhere does the current law expressly deny such protection, and providing it would provide incentives entirely consonant with the goal underlying the copyright clause of the Constitution: promoting the progress of science (in its 18th century sense).

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[2] A "measured drawing" is made by careful observations or surveying of an existing building's exterior and/or interior and then creating new graphic works from the observation and surveying.

The effect of § 102(b) of the copyright law (which codifies the rule in Baker v. Selden, 101 U.S. 99 (1879)) on protection of this type should be no different than with respect to any type of copyrighted work. The rule against protection for ideas, procedures, methods of operation and the like should not detract from the protectibility of original plans, drawings and other works related to architecture. While it may be appropriate, for example, to leave in the public domain the concept of a steel framework sheathed in glass and concrete, there is no public policy or statute dictating unencumbered access to any particular expression of that -- or any other -- concept.

4. Works related to architecture consist largely of arrangements, compilations, or modifications of previously existing components of other such works. While certain buildings may be striking in appearance, or even "novel" -- in the sense that they have no demonstrable antecedents -- their designs may be seen to consist substantially of the collocation of traditional (and sometimes even "classical") elements. While none of these individual elements, taken alone, may be eligible for copyright protection, their original arrangement -- in drawings, plans, and models -- by an architect results in a work of authorship, just as the arrangement of individually uncopyrightable words results in the production of a copyrightable literary work or the arrangement of uncopyrightable musical notes results in a copyrightable musical composition. The standard for copyright protection with respect to works related to architecture should be the same as applies to copyrighted works in all other media: originality, without more.

5. As previously stated, AIA does not now believe that buildings and structures should themselves be the subject matter of copyright. For the purpose of responding to the Copyright Office's question, however, the AIA believes that if such protection were established, its scope and the standard of infringement should be analyzed in the same way as copyright for any other class of works. The standard for infringement should be the same as for other copyrighted works viz., substantial similarity. Because this standard applies to all currently copyrighted works, it seems both unnecessary and perhaps almost impossible to establish a different standard of infringement with respect to one class of copyrighted works.

If protection were afforded buildings and structures, AIA assumes that all such "works" existing prior to the effective date of the statutory amendment effecting that change would be treated as being in the public domain. This would do much to reduce any possibility that such protection would restrain competition in the market for building designs.

Cases characterized by the Copyright Office as "recent decisions on the total concept and feel test" should apply to architectural infringement cases no differently than they do to allegations of infringement made with respect to works fixed in any other medium: if the detailed structure, sequence and organization of a building are copied from and substantially similar to those depicted in copyrighted works related to architecture (or, if buildings themselves were protected, if a copyrighted building's structure, sequence and organization were copied) and if a building that was functionally the same could have been built without copying protectible aspects of the original design, then infringement might be found.

To the extent that "total concept and feel" doctrine protects concepts or methods of operation it is inconsistent with §102(b) of the copyright law. To the extent that it is interpreted to extend protection not only to a work's precise expression but also to its detailed structure, sequence and organization, it is often little more than an inartfully-named recasting of Learned Hand's "abstraction" test first set out in Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930), and his later observation that such determinations "must necessarily be ad hoc." Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960). Thus the question may be analyzed under traditional idea-expression analysis, with courts attempting to protect the original expression of an author's ideas with respect to its verbatim or line-by-line duplication, its adaptation, and its detailed structure or "plot." If buildings were copyrightable, and an architect were to design a hotel atrium with several stories of open space and hanging gardens, his/her copyright in the building implementing that design would not bar others from designing and building other atria based upon that idea; it would simply prevent them from copying or adapting the original author's expression.

6. The AIA does not now advocate that the owner of copyright in a work related to architecture should have the right to prohibit others from constructing a building or structure similar to one constructed from his/her design; AIA does believe that original plans, drawings, elevations or models should be fully protected. Under the scheme AIA prefers, the building or structure itself is not protected by copyright and should not be construed to be a "copy" of the drawings and the like that depict it; therefore its reproduction -- if accomplished without copying or executing the original drawings and plans -- would not be construed to be an infringement of copyright. If, however, someone builds a building from copyrighted drawings, plans, and

the like, then the owner of copyright in such works related to architecture should have the right to deprive the infringer of any benefit of the unauthorized use of such works , including the right to compel the destruction of such buildings whether they have been completed or not.

The AIA notes that the remedy of destruction, within the sound discretion of the court, is available for all classes of copyrighted works, and should be interpreted to run to buildings and structures -- whether complete or not -- built from copyrighted plans without the permission of the copyright owner. The AIA acknowledges the view, reflected in earlier versions of legislation related to the Berne Convention, that destruction of buildings whose construction was substantially complete would be economically wasteful. The same may be said of the destruction of devices used to prepare infringing copies of "traditional" copyrighted works, and AIA believes courts are likely, on balance, to exercise properly the discretion implicit in §503(b) of the copyright law.

The right to build a building from copyrighted plans -- referred to here as the "execution" right -- is "part of the economic value of the drawings." Brainard, supra, 70 Cornell L.Rev. at 95. When a property owner retains an architect to prepare a set of plans, that owner also generally acquires the right to execute the plans on one occasion only in the absence of contractual language to the contrary. If owners, or others who come into possession of the plans, were free to build repeatedly from one set of plans, then architects would have less incentive to do creative work, and the diversity of expression that is the hallmark of all copyright markets would effectively be discouraged.

In addition, an architect's reputation in the architectural community and among the public at large depends to a great extent upon the appearance and utility of the buildings created from his plans and drawings. Virtually all works related to architecture are prepared under various constraints imposed by the site upon which the building is intended to be placed. As a result, the duplication of a building at another site is an activity of potentially great detriment to the architect. Not only is the infringing building likely to "look" wrong; it may also be subject to a variety of structural and safety problems.

For example, a building designed for installation in a region where hurricanes are common will require a structural design substantially different from an otherwise identical building designed for erection in an earthquake-prone region. If such a building were constructed in the "wrong" location from another's copyrighted plans, it might well fail to withstand the predictable stresses of its environment. Money damages alone would not always be sufficient to protect the reputation of an architect whose work has been "knocked off," or to compensate for possible allegations of negligent design.

In addition to equitable relief of the type described above, traditional copyright measures of damages (either the copyright owner's lost profits and the defendant's profits or statutory damages) would be necessary to make victims of architectural infringements whole.

7. If all intellectual property rights in a work related to architecture have been conveyed, the transferor should have no rights with respect to alterations of such works or of buildings erected through their execution. As noted in the answer to the previous question, a court should have the power, in its discretion, to compel the destruction of a building that is built from copyrighted works without the copyright owner's authorization.

8. The AIA believes that an architect's ability to disassociate himself from changes made by the owner of a building to which the architect has not consented can best be established by terms in the contract between architect and owner. While it is unclear today whether this Congress will enact legislation making the copyright law compatible with the Bèrne Convention, it appears that no broad moral rights regime, as originally set out in Rep. Kastenmeier's bill, H.R. 1623 (particularly proposed §106a of the copyright law) will be enacted. AIA believes that moral rights are essentially unnecessary with respect to works related to architecture and that prudent contracting practices can be employed to resolve most problems regarding owner post-construction modifications of buildings.

9. If buildings and structures were placed within the scope of the copyright law, the duration of such protection should be identical to that now provided in chapter 3 of title 17. Most such "works" would be unpublished works made for hire, and would thereby be protected for 100 years from creation. State laws should be preempted on the same bases as now provided in § 301: if a state law provided one or more rights "equivalent" to an exclusive right set out in the copyright law, such provision would be preempted.

10. If buildings and structures were placed within the scope of the copyright law, then an exemption from liability for the reproduction, distribution, performance or display of representations thereof would be entirely appropriate without regard

to whether the building or structure is located in a place accessible to the public. The purpose of copyright protection for buildings would be little served and the creative and consumer communities would be significantly burdened by, e.g., making it an infringement of an architect's copyright to depict a copyrighted building in a motion picture. (If the AIA position prevails, and buildings are left outside copyright's scope, then no exemption would be necessary.)

The exemption should be available to all authors of pictures, paintings, photographs, motion pictures, and the like, and should be expressly set out in the statute, without reference to § 107 or fair use concepts.

11. The initial owner of copyright in works related to architecture, as in all copyrighted works, is their author. In practice, the author is generally an architectural firm as the employer for hire of the architects, draftsmen, and technicians who physically create the plans and drawings. It is well settled that owners of real property who commission the creation of works related to architecture are neither authors (as commissioners of certain works made for hire) nor co-authors (with their architects). See, e.g., Meltzer v. Zoller, 520 F.Supp. 847 (D.N.J. 1981).

In addition to the case law, architects use and rely on AIA standard contracts that specify, in substantial detail, the allocation of possessory and intellectual property rights as among architects, owners of real property, and contractor-builders. The system now in place appears to work reasonably well, at least as far as it goes, given the relative paucity of disputes between architects and their clients concerning ownership of rights in plans and drawings. But specifications and reservations of rights do not suffice when, as is sometimes the case here, enforcement is difficult or impossible. In practical terms, an architect's reserved rights may be diminished or effectively mooted when, for example, a client whose building is under construction is adjudicated a bankrupt and, thereafter, a lending institution seeks to complete construction of the building without the services of the architect who designed it. Under present law, the architect can obtain neither an injunction against nor damages from the lender, who may realize a substantial benefit from the architect's work without compensation therefor. If the right to build from the plans were recognized as a copyright right, then architects would not be as vulnerable to third parties' ability to reduce both their income from and control over execution of their plans.

If copyright were extended to buildings and structures, initial ownership should vest in the architect, just as it does in the author of any work. The contractor who implements the plan by physically constructing the building should be analogized to a typesetter or cameraman: a skilled artisan, but not a co-author.

12. Contractual arrangements, as previously stated, have long been the norm in the architectural community. They work well in both the prevention and resolution of disputes, as long as third parties are not involved. When, however, parties not in privity argue over rights in drawings, plans, and other works related to architecture, then copyright and, to a lesser extent, other non-contractual forms of protection have major roles to play. AIA's preferred policy -- that protection should be provided against the unauthorized execution of drawings and plans in the construction of a building -- must generally be given effect extra-contractually: the infringing builder will only very rarely have a contractual relationship with the copyright owner. If the law is silent or ambiguous as to such activity, then the value of the traditional instruments of an architect's service -- works related to architecture -- and his/her reputation may be irreparably diminished.

13. The AIA has no substantial experience with architecture-copyright issues abroad. The experiences of other industrialized states are relevant here, and the practices recounted in the Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention are instructive. That other countries have chosen expressly to protect buildings and structures does not suggest that the United States follow suit. Architects in this country have long been free to "borrow" from their predecessors and contemporaries, and this freedom has contributed to the global successes of American architecture. It is not against such practices, but against the stealing of architects' plans and drawings, and the unauthorized execution thereof, that the law's attention should be directed.

Sincerely yours,

PROSKAUER ROSE GOETZ & MENDELSOHN

Christopher A. Meyer
Jon A. Baumgarten
Robert A. Gorman

International Business Machines Corporation

Intellectual Property Law

2000 Purchase Street, Purchase, New York 10577

Comment Letter
RM 88-4
No. 7

September 16, 1988

Dorothy M. Schrader, Esq.
General Counsel
Copyright Office
Room 403
James Madison Memorial Building
First Street and Independence Avenue, S.E.
Washington, D.C. 20559

OFFICE OF REGISTER
OF COPYRIGHT
SEP 19 1988
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Re: Copyright Office Notice of Inquiry
(RM 88-4) Concerning Architecture
53 Fed. Reg. 21,536

Dear Ms. Schrader:

IBM submits its comments in response to the above notice.

The Copyright Office notice states that the Office is examining the legal protection now provided for works of architecture and the need, if any, for further protection. The notice raises some issues of considerable interest to us.

First, we wish to comment on whether the scope of protection now provided to works of architecture under United States law satisfies our country's obligations under the Berne Convention. After reviewing the testimony of witnesses before the Senate and House in the current Congress, and studying the Final Report of the Ad Hoc Working Group, we are not persuaded that our present law satisfies our Berne obligations in this respect. Although we do protect architectural drawings, architectural models, and separable adornments and embellishments, we do not protect "works ... of architecture" themselves. Yet, as the AD Hoc Working Group points out, Article 2(1)(a) of the Berne Convention apparently requires such protection. At least in the absence of a "definitive survey" showing an absence of true protection for buildings in Berne countries which seem to protect such works, we agree that U.S. law does not appear to be compatible with Berne on this subject. Final Report of the Ad Hoc Working Group on U.S. adherence to the Berne Convention, reprinted in Columbia-VLA Journal of Law & the Arts (Summer 1986) 513, 607-609.

The Copyright Office notice raises the issue as to what form of legal protection should be made available for works of architecture if they are not fully protected as Berne requires. The notice's discussion of case law mentions in this connection ancillary forms of protection such as protection of design aspects as trade dress or as a service mark or by way of design patent or unfair competition law.

There is an implication in the phrasing of the questions (under the notice heading of "Subject Matter and Scope of Protection") that, in protecting architectural works, consideration should be given to new and different approaches such as: "other forms of protection to authorize the reproduction" of architectural works (Question 3); the "architects' use of ... designs that are staple, commonplace or familiar in the industry" (Question 4); whether "the standard of infringement ... (should) ... be the same as for traditional copyrighted works of the arts, i.e., substantial similarity?" (Question 5) ; "how long should the term of protection be ...? (Question 9); and "how would the work for hire doctrine in the Copyright Act affect ownership questions?" (Question 11).

The implication in these questions, and elsewhere in the notice, seems to be a suggestion that some sui generis form of protection outside of the Copyright Act might provide a simple answer to questions that are not simple, and do so in a way that eludes the Copyright Act. The truth is, however, that the principles and structure of the Copyright Act provide a sound basis for the provisions necessary for proper protection of architectural works. A deviation from such principles and structure, as exemplified perhaps by the Semiconductor Chip Protection Act of 1984, would be unfortunate.

While the existing copyright framework enables judges, authors and users to draw on a vast body of learning and precedent, a sui generis system would require them to start from scratch, constructing new statements of principles to replace the traditional case-by-case analysis under the existing law. Sui generis treatment for a major category of works cannot be justified. Architectural works should not have a truncated term of protection when, for example, newspapers are protected for 75 years (nothing is staler than yesterday's new). Nor should architectural works or any other category be discriminated against merely because they might include elements which are "staple, commonplace, or familiar in the industry." Surely the statutory criteria of originality (and protectibility) for popular songs should be no different merely because they include musical phrases that may be trite.

Moreover, explicit second-class protection for a category of work that qualifies for copyright status under Berne would raise questions about the seriousness of our own adherence, and might well invite our trading partners to cut back on their own copyright protection for other categories of Berne works, notwithstanding the strong U.S. interest in strict international standards.

We enclose a total of ten copies of this response, as requested. We are grateful for the opportunity to submit these comments for your consideration, and respectfully reserve our right to submit reply comments during the period to be permitted.

Sincerely,

INTERNATIONAL BUSINESS
MACHINES CORPORATION

By
J. W. Henderson, Jr.
Counsel - Copyrights
& Trademarks

/dcs
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Comment Letter
RM 88-4
No. 8

September 15, 1988

OFFICE OF REGISTER
OF COPYRIGHT
SEP 19 1988
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FEDERAL EXPRESS

Dorothy M. Schrader, Esq.
General Counsel
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Copyright Office Room 407
James Madison Memorial Building
First Street and Independence Avenue, S.E.
Washington, D.C. 20540

Re: Copyright Office Notice of Inquiry Concerning Works of Architecture, (Docket No. RM 88-4, 53 Fed. Reg. 21,536-38 (June 7, 1988)

Dear Ms. Schrader:

On behalf of the Information Industry Association ("IIA"), for which we are Proprietary Rights Counsel, we submit ten copies of the IIA's comments on the above notice of inquiry.

The IIA, founded in 1969, is a broad-based trade association representing over 700 companies that pursue the business opportunities associated with the creation, distribution and use of information online, in machine-readable copies, and otherwise. IIA companies make substantial investments to create, market and utilize databases and other works that are protected by copyright and that provide all sectors of society and the economy with valuable information.

The IIA is grateful for this opportunity to comment on the Office's notice of inquiry concerning architectural works.

* * * * *

As the IIA indicated in its testimony before the House of Representatives, architectural works comprise a category where further protection appears to be required if the United States is to satisfy the requirements for adherence to the Berne Convention. IIA testimony before Subcommittee on Courts, Civil

Liberties, and the Administration of Justice, House Committee on the Judiciary, 100th Cong. 2d Sess., on H.R. 1623 and H.R. 2962, February 10, 1988, p. 19. This would be true irrespective of whether the deficiencies in United States law in this respect are, for some parties, theoretically "capable of resolution through contractual agreements." (Notice, 53 Fed. Reg. 21536). For example, even if without copyright there were sufficient protection for databases under the agreements by which access to databases is customarily licensed -- and there is not -- Berne still requires they be given copyright protection.

In Question 4 of the notice, the Office raises an issue as to the "...effect of architects' use of classical or other public domain elements such as designs that are staple, commonplace, or familiar in the industry." A truism of copyright law, however, is that, whatever the protectible status of individual elements, their presence does not bar protection of an otherwise protectible work in which the elements appear. Such protection does not remove public domain elements from that domain, from which the public may still copy them free of restriction.

It is no infirmity in the copyright protection for a database or computer program that atomizing the work can reveal the individually unprotected word, number, alphanumeric character -- or even binary bit. Traditional works such as novels, plays and poetry are comprised of uncopyrightable words, symphonies of uncopyrightable musical notes, and paintings of uncopyrightable brush-strokes.

There can be originality, and protectibility, for all these works, regardless of whether they include elements of the staple, the commonplace or the familiar. Architectural works are no different in this respect, and we are aware of neither precedent nor policy that suggests they should be. Accordingly, the issue raised in Question 4 of the notice is not relevant to whether architectural works -- or any other works -- should be given the full protection that Berne requires.

We appreciate the opportunity to comment in response to the Copyright Office notice of inquiry, and hope that these and any further comments may be of assistance to the Office.

Sincerely,

SCHWAB GOLDBERG PRICE & DANNAY

Morton David Goldberg

Morton David Goldberg

MDG:sfs

AMERICAN INSTITUTE OF ARCHITECTS

Comment Letter
RM 88-4
No. 9

November 18, 1988

Hon. Ralph Oman
Register of Copyrights
Copyright Office
Washington, DC 20559

Re: Docket No. RM 88-4;
Copyright Protection for Architectural Works

Dear Mr. Oman:

The American Institute of Architects submits the following reply comments in response to the Copyright Office's Notice of Inquiry.

On behalf of our more than 40,000 architect members and the many other persons in our association who have an interest in the work of architects, we were pleased to note that others from around the country who responded to the Notice of Inquiry reflected a common desire for greater protection for works related to architecture. Several commentators expressed the view that there is a need for increased protection. We hope the Copyright Office will heed these calls for changes to the copyright law.

As to the specific points raised in our comments, there was agreement by Professor Shipley, Bregar Assoc., Inc., and attorneys Quatman and Brown that the construction of a building from copyrighted plans and drawings without the permission of the architect should be an infringement. All agree that contractual provisions, trade dress and service mark protection are inadequate to the task. The modest extension of current law that we all support should not present insurmountable interpretive barriers and is compatible with current doctrines such as Baker v. Selden and the "total concept and feel" test.

Other commentators agree with us on a number of other points as well. These common threads from persons both interested and knowledgeable in the subject suggest that there is a real need for revision of the copyright law beyond the bill signed by President Reagan on October 31, 1988 regarding Berne Convention implementation. We hope the Copyright Office will recommend to the Congress that new legislation be introduced.

The American Institute of architects is honored to have had the opportunity to contribute to the Copyright Office's study of the protection of

[illegible] • [illegible] • [illegible]

architectural works and works related to architecture. Please let us know if we can be of further assistance to your office.

Sincerely,

The American Institute of Architects

By: David K. Perdue

David K. Perdue
Associate General Counsel

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WRITER'S DIRECT DIAL NUMBER
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November 17, 1988

Comment Letter
RM 88-4
No. 10

BY FEDERAL EXPRESS

Ralph Oman
Register of Copyrights
Copyright Office
James Madison Memorial Building
Room 430
First and Independence Ave., S.E.
Washington, DC 20559

Re: Notice of Inquiry: Works of Architecture

Dear Mr. Oman:

In response to the Copyright Office Notice of Inquiry on Architectural Work Protections ("Notice") published at 53 Federal Register 21536 (June 7, 1988), we will set out in this letter our views on Question 11, inquiring about initial ownership of copyright in a work of architecture. We are not limiting our comments to any submissions previously received by the Copyright Office in response to the Notice.

As counsel to architects, contractors and owners, we repeatedly confront issues arising out of claims of ownership of copyright in architectural plans and drawings. As presently worded, the Copyright Act ("Act") fails to give an architect adequate protection when he submits plans in bidding on a job or works closely with a client in the preliminary planning for a design. These activities often precede any formal agreement on ownership of copyright in plans or drawings, and it is the Act alone that gives protection to the architect's interest if it is to be protected at all.

I. CONCLUSION

The Notice poses the following questions, among others, about initial ownership of copyright in architectural works:

> 11. Who should the initial owner of intellectual property rights in a protected work of architecture be, and how would the work for hire doctrine in the Copyright Act affect ownership questions? How are questions of ownership of intellectual property rights in works related to architecture presently resolved? Does that system work effectively? . . .

(53 Fed. Reg. at 21538). As we will explain below, it is our view that the Act does not give an architect adequate protection for his copyright in plans and drawings and that the principal source of uncertainty over ownership rights is the definition of work made for hire at Section 101 of the Act.

We recommend that, unless the Supreme Court this term holds that an "employee" for purposes of the definition is a person who constitutes an employee under traditional agency law concepts, the Act should be amended to so provide. An architect should have sole ownership of copyright in his work unless he has assigned ownership by means of a written instrument or has agreed in writing with the commissioning party that the work which is the subject of his engagement is a work made for hire.

II. DISCUSSION

A. Current Work Made for Hire Doctrine

Under the Act, copyright in an original work of authorship vests initially in the author. The creator of a work is not considered the author if the work is a "work made for hire", in which case the "author" for purposes of copyright is the employer or other person for whom the work was prepared. (Act §201[b]). The Act defines a work made for hire as

> (1) a work prepared by an employee within the scope of his or her employment; or
>
> (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer

> material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

(Act §101).

Subparagraph (1) of the definition has been subject to divergent interpretations. The courts of appeals for the Seventh and Second Circuits have held that an employment relationship exists where an artist or author works at the request and expense and under the direct supervision and control of the hiring party. Under this interpretation, independent contractors may be deemed to be employees for purposes of the work for hire definition if the requisite control and supervision are found. E.g., Evans Newton Inc. v. Chicago Systems Software, 793 F.2d 889, 894 (7th Cir.), cert. denied, 107 S.Ct. 434 (1986); Aldon Accessories Ltd. v. Spiegel, Inc., 738 F.2d 548, 551-53 (2d Cir.), cert. denied, 469 U.S. 982 (1984).

The courts of appeals for the Tenth and District of Columbia Circuits have interpreted the definition more restrictively. Whether the creator of a work is an employee for purposes of the definition is determined by traditional agency law rules, as reflected, for example, at Restatement (Second) of Agency §220 (1958). If the work is not done by such an employee in the scope of employment, but instead by an independent contractor, it is not a work made for hire unless it falls within one of the categories of subparagraph (2) of the definition and the parties so agree in writing. E.g., Community for Creative Non-Violence v. Reid, 6 U.S.P.Q. 2d 1990, 1997-98 (D.C. Cir. 1988), cert. granted, 57 U.S.L.W. ____ (U.S. Nov. 7, 1988); Easter Seal Society v. Playboy Enterprises, 815 F.2d 323, 328-37 (5th Cir. 1987), cert. denied, 108 S. Ct. 1280 (1988).

The Supreme Court granted certiorari last week to review the D.C. Circuit's holding in Community for Creative Non-Violence, but whether the Court will in fact resolve the conflict remains, of course, to be seen. We will assume for purposes of this letter that, whatever the Court's disposition of the case, amendment of the Act may be needed to achieve optimun protection for copyright in architectural works.

The work for hire definition in its present form does not explicitly address architectural works, yet it leaves open the possibility that architectural plans and drawings can constitute work for hire. Subparagraph (2) of the definition lists specific categories of work that may qualify as work for hire, and architectural plans are not among them. This absence forecloses such plans, all courts have acknowledged, from qualifying under this part of the definition. E.g., Joseph J. Legat Architects, P.C. v. United States Development Corp., 625 F. Supp. 293, 297 (N.D. Ill. 1985); Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Construction Co., 542 F. Supp. 252, 257 (D. Neb. 1982); Meltzer v. Zoller, 520 F. Supp. 847, 855 (D. N.J. 1981). Nonetheless, subparagraph (1) of the definition -- "a work prepared by an employee within the scope of his or her employment" -- is broad enough to encompass architectural plans under the Aldon Accessories interpretation of "employee".

Although this latter reading of subparagraph (1) opens wide the door for holding that an architect's plans and drawings are work made for hire, the reading has not yet been applied in a case in which ownership of copyright in an architect's work has been an issue. Those courts that have addressed the issue have held that, under the facts before them, plans were not work made for hire. Ownership of copyright remained with the architect. As shown below, the courts' analysis, however, has not been uniform, and it does not foreclose application of the Aldon Accessories construction of "employee".

The United States District Court for the District of Nebraska addressed in Aitken, Hazen whether there was an employer-employee relationship between the parties, an architect and a developer. It recognized the following test for determining whether such a relationship exists:

> The key factor in deciding whether an employment relationship exists between two parties is the employer's right to control and supervise the manner in which work is performed.

542 F. Supp. at 257. Applying this control and supervision test to the facts before it, the court held that no employment relationship existed. Id. at 258. The architect, not the commissioning party, owned copyright in the plans.

The court first reasoned that the architect was governed by the standards of the architectural and engineering professions and could not deviate from them in performance of his engagement. Id. at 257-58. The developer had the right to direct the result to be accomplished but it did not have the right to control and direct "the detail and means" by which the architect accomplished the desired result for the developer. Id. at 258. It remained the architect's obligation to "use its independent professional knowledge and experience in designing the architectural plans in question." Id. The court went on to observe that the relationship between the parties was "also devoid of other factors" typically present in an employment relationship, such as full-time work for the employer at the employer's place of business. Id. at 257.

The court also held that the developer could claim no interest in the plans under a theory that they were a joint work, because the evidence failed to establish, among other things, a specific intention to create a joint work. Id. at 259.

Another leading case on ownership of copyright in architectural works, Meltzer v. Zoller, likewise held that architectural plans do not constitute work made for hire. The court followed a different analysis, however, than the Aitken, Hazen court. The court did not even consider whether the architect had been an employee for purposes of subparagraph (1) of the work made for hire definition. Instead, it focused on the specific categories of subparagraph (2) of the definition and held that it does not reach architectural works:

> Architectural drawings are not included in the categories set forth in Section 101; and hence . . . do not qualify as works made for hire with the special legal consequences which flow from this designation.

520 F. Supp. at 855.

The Meltzer court then went on to apply an "intention" test to determine if the plans in question were, on this ground, works made for hire. It discussed a line of authority emerging from the 1909 Copyright Act under which, if the intentions of the parties were not expressly articulated, copyright was presumed to rest in the commissioning party. Id. at 856. Even under this test, the court found that the parties intended that the architect was to retain copyright ownership. Id.

Although *Meltzer* and *Aitken, Hazen* reached the same result, they did so by different paths, and they fall decidedly short of establishing conclusively that architectural plans can never constitute works for hire. This is especially true as long as the *Aldon Accessories* test for determining employee status is alive and well. *Aitken, Hazen* followed a control and supervision test but drew a distinction between independent contractors and employees, reasoning that the former cannot be employees under subparagraph (1) of the work made for hire definition. This attention to labels was, however, exactly what the Second Circuit eschewed in *Aldon Accessories* when it held that the independent contractor in question was an employee for purposes of subparagraph (1). 758 F.2d at 554. *Meltzer* turned off in another direction entirely, not even considering whether the architect was an employee.

Apart from its inconsistency with *Meltzer*, the court's reasoning in *Aitken, Hazen* is not internally persuasive. The fact that a commissioning party cannot require the architect to disregard the standards of the profession does not necessarily mean that such a party cannot exercise direction, control or supervision over the architect. The commissioning party may, for example, have an architect on its own staff to act as supervisor of the outside architect, and this architect could give direction to the outside architect without compromising the latter's professional integrity.

In any event, the lack of control over everyday details of an architect's production does not alone foreclose a conclusion that an employee-employer relationship exists. The court of appeals volunteered, for example, in *Community for Creative Non-Violence*, 6 U.S.P.Q.2d at 2000 n. 18, that, had it followed the "sufficiently supervised and directed" test, the artist in question would then have been an employee, despite the fact that the artist worked at his own studio in a different city from the commissioning party, engaged his own assistants, and generally appeared to work without any supervision other than explicit directions as to the desired result. Indeed, this dictum is the linchpin of the commissioning party's petition for a writ of certiorari: if the D.C. Circuit had followed the *Aldon Accessories* test, it would have reached the opposite conclusion as to whether copyright in the artist's work was owned by the commissioning party. (Petition for Writ of Certiorari at 12-13, *Community for Creative Non-Violence v. Reid*, No. 88-293 [U.S. filed Aug. 17, 1988]). As long as the supervision and direction test is the basis for analysis, even independent contractors may find out, in a copyright dispute, that they are "employees".

All of this potential for ambiguity and conflicting claims can, of course, be obviated by a properly drafted written contract of engagement. Under ideal circumstances, architects preserve copyright ownership in their work through contract. For instance, the American Institute of Architects Standard Form of Agreement Between Owner and Architect states explicitly that the architect owns copyright in his plans and drawings:

> 6.1 The Drawings, Specifications and other documents prepared by the Architect for this Project are instruments of the Architect's service for use solely with respect to this Project and, unless otherwise provided, the Architect shall be deemed the author of these documents and shall retain all common law, statutory and other reserved rights, including the copyright. . . .

(AIA Document B141 [1987]). This form, or variations of it, is in broad use throughout the country.

The fact that a properly drawn contract will protect the architect's copyright underscores the infirmity of the Act as presently worded. It is only after a written agreement has been executed that an architect can have any confidence that his ownership of copyright is secure. If the Act were amended as we will describe below, this gap in protection would not exist. Before addressing the text of an amendment, we will briefly describe one of our own encounters with this problem, for purposes of illustration.

One of our clients, an architectural firm, had been engaged by an advertising agency interested in relocating its offices. The architect was to determine the space needs of the agency and to recommend an interior design for its new quarters. The parties entered into a written agreement covering preliminary work; the agreement did not address the ownership of any design arrived at by the architect. The parties' relationship broke off before any AIA form or other final contract could be executed.

Representatives of the architect and the agency met regularly over many weeks to discuss the agency's needs and objectives. Following intensive effort, the architect arrived at a design concept consisting of floor plans and perspective drawings, all of which were made available to the agency. Immediately following presentation by the architect of the plans and drawings, the agency announced that it no longer needed the services of the architect. The project was to be completed with the services of another architect.

The matter would have been at an end, except our client shortly thereafter learned that the new architect intended to use the design our client had developed. A question then arose as to the ownership of copyright in the plans and drawings embodying the design. Our client was indisputably the author, but the agency had fully paid our client for work done to date. The client was arguably under the direction and supervision of the agency, and it was certainly contemplated that the work prepared by the architect was for the benefit of the agency. The work for hire doctrine presented more questions than answers.

This particular imbroglio was resolved through negotiation, but it would not even have arisen if the architect's rights had been clear under the Act. We will describe below how the Act should be amended so this kind of uncertainty can be eliminated.

B. Suggested Solution

As the foregoing discussion emphasizes, a commissioning party now has the ability, in the absence of specific contractual provisions to the contrary, to claim ownership of copyright in plans prepared by an architect for a bid or preliminary negotiations on a job. He can do so by simply urging that the architect's plans are a work made for hire, invoking subparagraph (1) of the Act's definition.

The Act should be amended to give architects greater control over their work and to afford greater certainty to architects, contractors and owners alike in their relationships with each other. The desideratum is ownership by the architect alone of all copyright in his plans and drawings, except where a traditional employment relationship exists or where a written assignment or contract provides otherwise.

The Supreme Court's decision on the merits in Community For Creative Non-Violence could produce this desired result. If the Court were to adopt the literal interpretation favored by the Fifth and District of Columbia Circuits, architectural plans and drawings would qualify as works for hire only if created in an employment setting (or, of course, by written agreement). Such a decision would protect the rights of architects working and creating without benefit of a contract. No additional statutory modification would be necessary.

On the other hand, if the Court were to embrace the direction and control approach of the Second and Seventh Circuits, the present uncertainties would remain. While it would be clear that strict agency principles would not determine an architect's status as an employee, it would remain unclear whether sufficient direction and control exist in any given situation. Architects would continue to face the prospect of being classified an "employee" under subparagraph (1) of the definition of work made for hire even though they function as independent contractors.

Congress should amend the definition of a work made for hire if the Supreme Court fails to hold that the definition encompasses only traditional employment settings and those explicitly enumerated categories of subparagraph (2). A satisfactory amendment for this purpose was introduced, but not acted upon, during the last Congress.

Senator Cochran of Mississippi introduced a bill, S. 1223, in the first session of the 100th Congress to amend the definition of works made for hire. The bill would have amended the definition as follows (proposed language underlined):

> A "work made for hire" is --
>
> (1) a work prepared by an employee within the scope of his or her employment if the employee receives all employment benefits under applicable State and Federal law and the employer withholds taxes from such payments to the employee and remits such taxes to the Internal Revenue Service; or
>
> (2) a work specially ordered or commissioned for use as a part of a motion picture, if for each such work

> the parties expressly agree in a separate written instrument signed by them prior to the commencement of any work pursuant to such an order or commission that the work shall be considered a work made for hire.
>
> Unless the work falls within either clause (1) or clause (2), it cannot be work made for hire.

(S. 1223, §1). The proposed bill also would have amended the definition of "joint work" at Section 101 of the Act and made other amendments to clarify that, except as to a work made for hire, ownership of copyright in a specially ordered or commissioned work vests in the creator of the work until such time as copyright is formally transferred by written assignment or, as to a joint work, only if the parties first agree in writing that it is to be a joint work. (The bill and pertinent legislative history are reproduced as an appendix to Respondent's Brief in Opposition, filed October 17, 1988, in Community for Creative Non-Violence v. Reid, No. 88-293 [U.S.]).

Senator Cochran intends to reintroduce this bill in the next Congress, and the Chairman of the Subcommittee on Patents, Copyrights, and Trademarks gave the Senator assurance during floor debate on the Berne Convention implementation legislation on October 5 of this year that hearings will be held on any such bill in the next Congress. (134 Cong. Rec. S 14560-63 [daily ed. October 5, 1988]).

Although the Cochran bill as introduced would have modified both subparagraphs (1) and (2) of the definition (and therefore would exceed what is required for protection of ownership of copyright in architectural works), it contains the language needed to ensure that ownership of copyright in architectural plans remains with the architect. We believe that the Copyright Office should press for passage of this or equivalent legislation in the next Congress if the Supreme Court fails to affirm Community for Creative Non-Violence.

Finally, we do not believe that there are any countervailing considerations that would justify leaving intact the present definition of work made for hire. The foregoing amendment of subparagraph (1) of the definition would not cause any shift of or dislocation in the relative rights of architects, contractors and owners in plans and drawings. Rather, it would remove the fog that has settled over the architect-owner relationship by codifying the holdings of cases such as Aitken, Hazen and Meltzer, and it would thereby free architects from the uncertainty that now exists when, as is inevitable in the marketplace, they must prepare and submit bids and plans before having the protection of a carefully worded written contract preserving ownership of copyright in the fruits of their labor.

Yours truly,

Thomas Collin

Thomas J. Collin

TJC:emr

cc: Kent K. B. Hanson, Esq.

COMMENTS OF THE FRANK LLOYD WRIGHT FOUNDATION

TO

U.S. COPYRIGHT OFFICE NOTICE OF INQUIRY ON ARCHITECTURAL WORK PROTECTIONS

53 FR 21536

Submitted on Behalf of the Frank Lloyd Wright Foundation by:

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COMMENTS OF THE FRANK LLOYD WRIGHT FOUNDATION

This comment is submitted in response to the June 8, 1988 Notice of Inquiry of the Copyright Office.[1] We begin by providing brief answers to the questions posed in The Notice and conclude with a fuller discussion of what we view as the critical points:

Subject Matter and Scope of Protection

1. What forms of legal protection are presently available to protect works of architecture and works related to architecture? Copyright, Design Patent, Trade Dress, Trademark, Unfair Competition and Contract Law.

2. Is that protection sufficient to foster the economic and aesthetic interests of those involved in the creation and exploitation of such works? No. The most important practical form of protection, namely copyright, has serious limitations.

3. If not, should the creators of works of architecture and works related to architecture have the exclusive right under the Copyright Act or other forms of protection to authorize the reproduction of their works? Yes. Should copyright or other forms of protection be extended to buildings or structures provided they contain externally or internally conceptually separable elements as to form or design, and if so, what test should be used to determine whether conceptual separability exists? Whether or not conceptual separability exists is a consequence of the public's perception of whether the article

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[1] 53 Fed. Reg. 21536-21538.

functions, conceptually, as both a useful article and a copyrightable work (for example, a sculptural work). It is then, a factual analysis. Public understanding of this conceptual duality may be assessed through surveys, circumstantial evidence (for example, if the design of the article has won acclaim or awards in artistic circles), expert testimony, and the like. This approach is supported by analogous, established tests in determining whether a utilitarian design or configuration also is understood (conceptionally) by the public as having the dual role of a trademark or other symbol of origin.

If copyright or other forms of protection should not be extended to the buildings or structures themselves, should it be extended to prevent the construction of buildings or structures based on infringing architectural plans, drawings, elevations, or three-dimensional models; and, if so, would such a right, in practice, nevertheless result in protection of buildings or structures? While we believe that copyright should be extended to protect qualified buildings or structures, if such protection is not afforded, then protection should be extended to prevent such construction. The right to prevent construction or to force modification will protect to some extent the design as represented by particular buildings or structures; it will not afford protection, however, where construction is based solely or substantially on a visual or hands-on inspection of the building or structure. Nevertheless, protection of the resulting buildings or structures in this regard would be more consistent with the nation's obligations under the Berne Convention than presently exists.

What is the effect of 17 U.S.C. 102(b) and Baker v. Selden, 101 U.S. 99 (1879) on such protection? We do not view Baker v. Selden or §102(b) of the Act as having any effect on the protection of copyrightable elements of a building or structure under copyright, just as neither affects protection of any other copyrightable work. The design of a building or structure is not §102(b) subject matter. Similarly, we concur with both CONTU'S and Professor Nimmer's conclusions regarding the effect of Baker, that is, "the rationale for the doctrine of Baker v. Selden in no event justified the denial of copyrightability to any work." 1 Nimmer on Copyright, §37.31 (1976), quoted in Final Report of the National Commission on New Technological Uses of Copyright Works, at 19 (1978). Can a building or structure be a "copy" of architectural plans it is derived from and if so, does it make a difference whether the building or structure itself constitutes a copyrightable work? Yes. A building or a structure could be viewed as a "copy" of the architectural plans from which it is derived, although the judiciary may differ on this point depending upon their view of "originality" as applied to three-dimensional renditions of pictorial or graphic works. See generally W. Patry, Latman's The Copyright Law 24-28 (6th ed. 1986). Accordingly, if the building or structure constitutes a separate copyrightable work, either as an original sculptural work or a compilation (the selection, arrangement and coordination of new matter and preexisting matter collected and assembled by the architect), the more likely will be the upholding of the work's copyrightability. Further, the separate copyrightability of a building or structure would make a difference in that it would provide protection against reproduction based on visual and on-site inspection.

4. What is the effect of architects' use of classical or other public domain elements such as designs that are staple, commonplace, or familiar in the industry? While there should not be any right to exclusive use of any one of those elements, an original work embodying some of the elements, or an original compilation of such elements, should be subject to protection, just as with other original works which contain some public domain elements. These would be the "scenes a faire" of an architectural work, analytically.

5. If protection should be granted to buildings or structures, what should the scope of that protection be? Should the standard for infringement of buildings or structures be the same as for traditional copyrighted works of the arts, i.e., substantial similarity? How would recent decisions on the total concept and feel test apply to infringement of works of architecture? Yes. Substantial similarity should be the test as applied to all copyrightable works. With respect to recent decisions on the "total concept and feel," application of this "test" has been applied disparately, particularly in the area of protection of computer programs, and appears to still be in its formative stages for such works, and so it is difficult to predict what effect these decisions will have. Interestingly, in view of

the "useful" nature of computer programs and their broad protection under "total concept and feel" tests, one could portend analogize to protection of architectural works. The application of a "total concept and feel" test for determining infringement other than where computer programs are involved, for example, of literary works, artistic works (pictorial, graphic and sculptural) and other such works is not new, has been so applied by many courts, and can be applied to architectural works.

6. Should the owner of the intellectual property rights in a protected work of architecture have the right to prohibit others from constructing an otherwise infringing work if those others have created their work without the aid of the original plans, drawings, elevations, or three-dimensional models, such as by viewing the protected work or by taking its measurements? Yes. The viewing of the protected work and/or taking its measurements for purposes of creating plans from which a substantially similar structure would be constructed would be unauthorized reproduction of the protected work, just as the copying of any protected work (and not the underlying "planning" works, for example, artist's sketches or motion picture treatments) for purposes of creating a substantially similar work would be a §106 violation. Should the owner of the intellectual property rights in a protected building have the right to require destruction of completed or uncompleted buildings or structures? No. Modification would suffice if such modifications would ensure that there would no longer be substantial similarity. What would the appropriate monetary remedies be for infringement of a protected work of architecture

or work related to architecture? One measure might be the fee that would have been charged for the right to reproduce the work. Where the owner of the copyright in the design is also the owner of a physical building evidencing the design, the loss of market value due to loss of uniqueness or distinctiveness might also be a measure.

7. If the owner of the intellectual property rights in a work of architecture conveys those rights, should he or she still have the right to prohibit alterations to the work, and if so, what kind of alterations, all or only those that are not of a practical or technical nature necessary for maintenance or repair? There should not be any right to stop physical alterations of the work by assignees of those rights. However, remedies should be permitted for mutilation or other alterations which could come within the meaning of moral rights under the Berne Convention. If he or she should have the right to prohibit alterations (or at least those of a non-utilitarian purpose or effect), and the owner of the material embodiment of the work makes unauthorized alterations, what should the available remedies be? Remedies analogous to those found in state moral rights statutes should be available, see, for example, the California Art Preservation Act of 1979. Should the owner of the intellectual property rights in a work of architecture ever have the right to require or demand the destruction of infringing buildings or structures or to prohibit their removal from a specific site? No, a right to modification would be sufficient to address the interests of the copyright owner without wasting valuable societal resources. Only

by a contract with the owner of the physical work or by exercise of a remedy for violation of a moral right should there be any right of the owner of the design to prevent removal.

8. Should the owner of the intellectual property rights in a protected work of architecture that has been altered without consent have the right to prohibit his or her association or authorship with the work. Yes. This would be consistent with contract, trademark, right of publicity and moral rights laws.

9. Assuming rights should be granted to works of architecture, how long should the term of protection be, and if federal rights are involved, including copyright, what should the extent of preemption of state law be? The present terms of copyright protection should be sufficient. The extent of preemption under §301 as currently construed for all works would be applicable.

10. If rights were granted to works of architecture, should there be an exemption for the making, distributing, or public display of pictures, paintings, photographs of other pictorial representations if the work is located in a place accessible to the public, and if so, should the exemption be limited to noncommercial use? Yes, and under copyright law such an exemption need not be limited to noncommercial uses, but could extend to fair, commercial uses. What role would the fair use doctrine play if protection were granted? The role of the fair use doctrine, as codified in 17 U.S.C. § 107, should be no different in this context than the role this doctrine plays with other copyrighted works.

11. Who should the initial owner of intellectual property rights in a protected work of architecture be, and how would the work for hire doctrine in the Copyright Act affect ownership questions? The statutory author of the protected work, normally the architect, would be the initial rights owner. The work for hire doctrine would affect ownership questions here as in all other areas where work is being commissioned, that is, application of the doctrine would not be different for architectural works. How are questions of ownership of intellectual property rights in works related to architecture presently resolved? Generally by contract law through use of common industry wide forms and by application of copyright law as to independent contractors. Does that system work effectively? Generally, yes, as to those who are parties to the contract but not with respect to third parties. How would the copyright concept of joint ownership operate if protection were extended to works of architecture? The same as it does with all other works.

Contractual Practices

12. Can private, consensual agreements resolve any perceived deficiencies with the current state of protection for works of architecture and works related to architecture? Only as to the parties to the agreement but not as to parties most likely to copy.

Foreign Law and Practices

13. What is the nature and extent of protection granted in foreign countries to works of architecture and works related to architecture and how is that protection actually accorded in

practice? Are foreign practices relevant or applicable to practice in the United States? Most Berne members extend protection to works of architecture and works related to architecture. Since we are members of Berne, foreign practices are both relevant and applicable.

DISCUSSION

Introduction

"It's okay to copy the appearance of that house identically, but don't you dare use the underlying plans to achieve the same result." "Go ahead and copy that award-winning chair exactly, but you cannot use the written drawings on which it is based to produce the copy." Every now and then, the legal system provides an anomalous result which everyone senses is wrong, but for which an equitable solution is believed to be particularly elusive. There can be no doubt that as a practical matter buildings, and most particularly residential homes, as well as articles of interior design, have become legal orphans in a federal framework of intellectual property laws that otherwise protect original and/or distinctive works against misappropriation.[2]

This comment suggests that works, such as building structures and objects of interior design which incorporate original artistic elements, should be and indeed are protected under the copyright law. We believe that design rights in architectural works should be based on the originality and authorship of the work as a whole rather than on narrowly focusing on particular functional (or nonfunctional), representational (or nonrepresentational), or literal (or nonliteral) parts. We further believe that there is no impediment to copyright protection of the design of an architectural work imposed by the §101 definitions of "pictorial, graphic and sculptural works" or "useful article," since conceptual and physical separability can easily be determined. The issue is: is the work perceived (understood) by the ordinary observer as dually functioning as both a work of art and as a work of utility, and if so, does the work of art contain sufficient "originality?" If an architectural work is sufficiently original, it should be entitled to protection under the copyright laws.

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[2] The result is that access to many original drawings and plans must be severely limited and carefully guarded if control over accurate reproductions is to be preserved. This imposes a severe and unwarranted burden on those wishing to protect such items against unauthorized duplication.

The copyright in original architectural plans should automatically provide to the owner the right not only to reproduce the plans but also to reproduce the architectural objects depicted therein in all dimensions, whether copied from a copy (such as a building based on the plans) or from the original plans themselves. Moreover, whether viewed as a sculptural work or a derivative work or compilation, the actual structure should be entitled to separate copyright protection if original.

The Need for Clarification

A working architect may start a project either with or without a client in hand. The architect begins with a concept that is either original or, where a client is at hand, it might be derived, at least in part, from the wishes of the client. Once a project is actually funded, it may go through a rapid series of changes, or working drawings, wherein the needs and wants of the client and the sensibilities and interpretive powers of the architect are meshed. Typically, the work is represented first in a series of evolving drawings and plans and later, perhaps, in a working model. In most situations, unless there is a contract to the contrary, the architect will retain ownership of all plans and specifications by virtue of the fact that the architect is usually an independent contractor. See Joseph J. Legat Architects v. United States, 625 F.Supp. 293, 229 U.S.P.Q. 132 (N.D. Ill. 1985); Meltzer v. Zoller, 520 F.Supp 847, 216 U.S.P.Q. 776 (N.J. 1981); see also B. Le Patner, The Profitable Professional: Protecting Ownership and Use of Plans, Architectural Record, January 1987, at p. 47. Once the work is completed and paid for, the architect's interest in the actual physical building or work of interior design traditionally has been treated as having ended, with one important exception: architects generally believe they have both a legal and moral right to control any further reproductions of the design.[3] Architects feel that having developed plans, only they should have a right to bring them to life; this is not strictly a matter of contract or copyright law but also involves droit moral and the commercial value of consumer identification with particular designs of projects. See e.g. Joseph J. Legat Architects, 625 F.Supp. at 296-97.

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[3] We note that some architects choose not to enforce these rights. By providing for more effective protection for architectural works, it is likely that many of these architects will become more aggressive.

This scenario is in many ways unlike those that are typically seen with "inventions." With inventions, the inventor typically has more control over the process and the outcome; the materials prepared that lead up to the invention are usually less important and less valuable than the resulting invention itself. Furthermore, an invention, or for that matter most patentable objects, usually represent much greater novelty over that which has gone before.

Not so with works of architecture, especially the more distinctive and unique forms of architecture that are most clearly part functional architecture and part art (hereafter referred to as "architectural art").[4] For architecture to be original in the copyright sense, it need not represent any advance in novelty over prior art; in fact, its appeal may be based on its connections to certain prior forms. The working drawings which lead up to a particular project may also in time lead to a host of other projects, which could be equally or more valuable to the architect. The drawings and plans in and of themselves represent relatively less value to the architect than the architect's fees that might be derived from bringing the particular object depicted therein into a three dimensional form. Yet this might not occur for years and years after the design is created. After a client is found, the client normally identifies his or her desires, and the project becomes increasingly customized (through the hand of the architect who interprets that input); yet, it is important to achieve protection for all of the original works that are developed in the course of the project, as well as the final customized one. Thus, the commercial exploitation of an architect's designs, unlike most inventions, may lie dormant for long periods of time, not for lack of creativity but for lack of a match between paying client and architect.[5]

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[4] Architectural art goes beyond the use of common elements. Instead, as with museum art, it usually makes a statement, commands a higher price as a result, and is indeed perceived as art, whatever its separate practical utility might be. There are many objective ways for measuring whether the threshold for architectural art has been reached: museum displays, appraisal as art, comparative price, viewer perception, etc.

The nature of an architect's work thus necessitates a form of protection that is more easily attained, will last a long time, and is cost effective. Copyright and contract law traditionally have been seen as meeting the need of architects; however, the potential inability to exercise exclusive rights in the physical objects depicted in their designs both has plagued and evaded architects for years in their attempt to preserve both the artistic and commercial value of their works.

Existing Forms of Legal Protection Are Inadequate In Protecting Works of Architecture and Works Related to Architecture.

A. Design Patent Protection Is An Impractical Alternative.

Unlike copyright, with its modest requirement of originality, the barriers to design patent protection are imposing. Under the design patent law, a design patent subsists in "any new, original and ornamental design for an article of manufacture." 35 U.S.C.§ 171 (1982). A design may consist of surface ornamentation, configuration or a combination of both. 1 Chisum, Patents, § 1.04, p. 1-180 (1988).[6] A design, consisting of the configuration or surface ornamentation of an article of manufacture, is patentable if it is ornamental and meets the general patent requirements of novelty, originality, nonobviousness. As a result of these many prerequisites, it is difficult to obtain a valid design patent.

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[5] The hit and miss nature of an architect's working life often creates an uneven cash flow with periods of great and fervent activity and little time to pay attention to legal details.

To begin with, like copyright law, a design is not patentable if it is dictated by some consideration of function. See, Power Controls Corp. v. Hybrinetics, Inc., 806 F.2d 234, 231 U.S.P.Q. 774 (Fed. Cir. 1986) ("If the patented design is primarily functional rather than ornamental, the patent is invalid."). This ornamental/functional dichotomy is just as difficult to decipher and apply in the patent area as it is under copyright law. The statutory bar of novelty presents a formidable hurdle as well, because a prior design will anticipate, even though it is an article of different use, or is in a non-analogous art. See U.S. Patent & Trademark Office, Manual of Patent Examining Procedure, § 1504 (4th Rev. Ed. 1982) ("As novelty of configuration or surface ornamentation is a requisite for design patentability, a design which is merely simulative of a known object is not patentable, and this is true even though it is used for a different purpose or function.")

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[6] A succinct definition of a design within the meaning of 35 U.S.C.§ 171 is that adopted by the Patent and Trademark Office:

> "The design of an object consists of the visual characteristics or aspects displayed by the object. It is the appearance presented by the object which creates an impression, through the eye upon the mind of the observer.
>
> As a design is manifested in appearance the subject matter of a design application may relate to the configuration or shape of an object, to a surface ornamentation thereof, or both.
>
> A design is inseparable from the object and cannot exist alone merely as a scheme of surface ornamentation. It must be a definite preconceived thing, capable of reproduction and not merely the result of a method."

U.S. Patent and Trademark Office, Manual of Patent Examining Procedure, § 1502 (4th Rev. Ed. 1982).

By far the biggest obstacle to design patent protection is the requirement that the design be nonobvious in light of the prior art. 35 U.S.C. § 103. As noted by Professor Chisum in his treatise on patents, "the difficulties in applying the Section 103 standard of nonobviousness to designs exceed those encountered with utility inventions." 1 Chisum, Patents, § 1.04[2][f], p. 1-199 (1988). This is manifested primarily in the assessment of what is the pertinent art and who is the ordinary designer with skill in the pertinent art. Thus, the statutory prerequisite of nonobviousness is a very difficult standard to overcome in our context.

In sum, these statutory requisites, when combined with the high cost and long delay that is associated with obtaining a design patent, makes the design patent law unworkable and impractical in protecting works of architecture and works related to architecture.[7]

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[7] This is, however, not to say that protection is unavailable under design patents for buildings. See e.g. Ex Parte Wilbur B. Foshay and Gottlieb R. Magney 7 U.S.P.Q. 121 (1930) (design patent for a building allowed).

In his lifetime, Frank Lloyd Wright produced tens of thousands of drawings and plans for homes, commercial buildings and objects of decorative art. Most of these have not yet been sold to clients.[8] If the Foundation had relied strictly and solely on patent protection, to the extent it was available, for all of Mr. Wright's drawings and plans, it would have lost the opportunity to exploit these designs commercially as Mr. Wright intended. Furthermore, if Mr. Wright, or for that matter if any architect, tried to obtain design patent protection for each of his or her designs, this would have created a precarious financial condition. Instead, Mr. Wright and the Foundation kept his designs largely as unpublished copyrighted works, limiting access to scholars and those with noncommercial needs. Thus, faced with apparently no protection against the construction by others of structures based on these plans, Mr. Wright and the Foundation found it necessary to prevent or limit publication of Mr. Wright's designs. In this manner they reserved the opportunity to exploit the commercial value of the designs over the next century. Such measures would become less necessary if copyright protection was fully available.

B. Neither Trademark Nor Unfair Competition Law is Adequate to Protect Architectural Works

Trademark law and unfair competition law at both the federal and state levels are not readily available as a practical matter to protect architectural works. These laws protect symbols of origin (including names, words, designs and devices) which are used to identify and distinguish products or services from those of others and to identify the source of these products or services. While the configurations of functional articles may qualify for protection under these laws, it is very difficult to obtain such protection. Further, the law regarding what is or is not functional, and what it means to be functional, is far from clear. See generally 1 McCarthy, Trademarks and Unfair Competition, at §§7:23-7:34.

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[8] The sale of unbuilt designs provides a steady stream of income to The Frank Lloyd Wright Foundation each year.

The first obstacle to trademark protection facing the architect who designs a one-of-a-kind building or a distinctive object of architectural art is to prove that the object is a "good," that is, that the building is a "unique product" capable of protection. See 15 U.S.C. §1127 (definition of "trademark"). Even if such could be shown, since federal protection requires that the trademark be used "in commerce," it would be extremely difficult to show that a one-of-a-kind structure is so used. The architect might also try to prove that the structure serves as a "service mark" for his or her architectural services, but for similar reasons, (unique service and use in commerce), this too would be an unlikely avenue for protection.

The second obstacle is the doctrine of functionality. While the designs or configurations of utilitarian objects may qualify for federal registration, and common law protection if shown: (a) not to be necessary for competition, (that is, not principally functional), (b) to have the requisite distinctiveness, and (c) to have acquired secondary meaning, a number of courts hold as a matter of law that article designs which are at all utilitarian or are "aesthetically functional" are not protectable. See generally 1 McCarthy, supra, at §7:26. Moreover, the holding in Demetriades v. Kaufman, 680 F. Supp. 658, (S.D.N.Y. 1958) on the Lanham (Trademark) Act claim presages that courts may view one-of-a-kind structures as being unprotectable. The court there stated "[i]t simply is untenable that the house at 12A Cooper Road is one of a kind and, in the same breath, argue that it has secondary meaning in the market...." Id. at 668. In so holding, the court distinguished cases in which distinctive features of multi-reproduced buildings used in connection with products and/or services had been held to be protectable as "trade dress" under section 43(a) of the Lanham Act. See id. at 669; Fotomat Corp. v. Cochran, 437 F.Supp. 1231 (D. Kan. 1977)(the "uniquely designed, blue Fotomat [kiosk], with its yellow, three-tiered roof" held a valid service mark). See also 1 McCarthy, supra, at §7:34. The Demetriades court further expressed its doubts that a "residential home," no matter how distinctive or artistically unique, could "qualify as a nonfunctional good," since "[a] home, with its roof, siding, doors, windows, etc., is an inherently functional structure." 680 F.Supp. at 667 (emphasis added).

Finally, even if a designer could overcome these obstacles to trademark or trade dress protection, the architect would still be met with the difficult burden of establishing that consumers are likely to be confused by an unauthorized copy of that particular design.[9] First, because most works of architecture are not inherently distinctive and have not established secondary meaning, the consumer is not likely to be confused by the copy since the original is by-and-large unknown to consumers. An architect usually only creates the design but does not use it with an ongoing business. Thus, even if it were distinctive, it is unlikely to be seen as the "trade dress" of the architect; it is more likely to be associated with the business or homeowners who occupy it. Moreover, for works of architecture and works related to architecture, the third party copier will often make only a single unauthorized copy; this would tend to negate any consumer confusion because the public will not be exposed regularly to either the original or the copy and hence the commercial impression created by either will be likely isolated. Under such circumstances, the likelihood of consumer confusion will be lacking.[10]

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[9] The method of proving the trademark law test of likelihood of confusion (or "confusing similarity") is very different from, and more difficult than, proving "substantial similarity" in copyright

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(footnote continued from previous page)
law.

[10] Another barrier to effective trademark protection is the inability to obtain Federal trademark protection for marks used on or with structures. A home or building (other than a mobile structure) is not considered a "good" which is sold in interstate commerce. See In re US Home Corp of Texas, 201 USPQ 602 (TTAB 1978). To illustrate this point, let us say that an architect calls his design an "XYZ Home" and appends the mark to the home before sale. If the architect seeks to protect that term under current federal trademark laws, XYZ could not be protected as a federally registered trademark unless the home were a mobile home that travelled through interstate commerce and was deemed personalty rather than real property. As the law now stands, even if the architect built an "XYZ Home" in every state, that term more likely than not would be viewed as being used with real estate, and not goods, and thus would not be protectable federally as a trademark.

IV. Existing Copyright Protection Should Be Applied to Cover Architectural Works

We believe that existing copyright law should be interpreted to cover the pictorial, graphic or sculptural features of a design of an architectural work to the extent such features are understood to "exist independently" of the utilitarian aspects of the useful article. These pictorial, graphic or sculptural features of the design could, under this approach, inhere in the entire architectural work, or in portions of the work. Registration of a claim of copyright in such features could be accomplished either by single registration of the claim in the underlying architectural plans, which would then cover the copyrightable pictorial, graphic or sculptural features of the resulting constructed architectural work, or by registration of the claim of copyright in these features of the resulting, constructed architectural work. Thus, the residence that is built from copyrighted plans would be protected to the extent its design contains copyrightable matter.

We further believe that if the design of the architectural work is purely non-functional or monumental, copyright protection should be available without analysis of the work as a design of a useful article.

An exhaustive analysis of current practice, and the history leading to that practice is beyond the scope of this Response. See generally W. Patry, Latman's The Copyright Law, pp. 35-45 (6th ed. 1986). We concur with the analysis of conceptual separability discussed in that treatise. We further fully agree that the "temporal displacement test" set out by Judge John O. Newman in his dissent in Carol Barnhart Inc. v. Economy Cover Corp., 773 F.2d 411, 419-426 (2d Cir. 1985)(Newman, J., dissenting) offers the most persuasive approach to date for determining conceptual separability. Indeed, we believe it is, with some modification (discussed below), the proper approach for architectural works analysis.

Architecture is clearly a unique area that regularly spans the world of art with the world of day-to-day living, and also incorporates the functional and aesthetic needs of the client. Unlike industrial art, architecture normally contains many pure art elements and is widely perceived as an art form in its more distinctive expressions. Witness the weekend afternoon drives around distinctive residential neighborhoods to admire the architectural art of home; how does such a trip differ from a trip to the museum to view less dimensional art forms? Indeed, the architectural work which is the Guggenheim Museum is viewed more of an artistic masterpiece than are most of the works of fine art displayed within its structure.

We submit that the "temporal displacement test" opined by Judge Newman need not focus on the issue of whether the "work of art" aspect is viewed entirely separate from the utilitarian aspect. Instead, we believe that the issue is whether the ordinary observer understands the work as having a conceptually dual function--that of a work of art and that of a useful article. If the observer has this understanding, conceptual separability exits.

A precedent for this analysis is found in trademark law. Under that body of law, terms or configurations which serve a functional purpose nevertheless will be protected if the public -- the ordinary observer -- understands that term or configuration as having the dual role of serving as a distinctive symbol of origin. See generally A. Greenbaum, J. Ginsburg and S. Weinberg, A Proposal For Evaluating Genericism After "Anti-Monopoly", 73 The Trademark Rptr. 101 (1983).

This test of "dual function" has been applied in determining whether the design or configuration of a useful article (or feature of that design or configuration), in addition to serving a utilitarian purpose, also is perceived as having a non-functional trademark purpose. For example, in a landmark decision setting out this test, the former Court of Customs and Patent Appeals (now the Court of Appeals for the Federal Circuit) held that the design of a cleaning product container, while having a utilitarian purpose, was not so related to its utilitarian function as to deprive it of legal protection where it was shown that the design also was understood as a "symbol of origin," that is, as a trademark. In re Morton Norwich Products, Inc., 671 F.2d 1332 (C.C.P.A. 1982).

Conceptually, such a test for dual role functioning could also serve as a model that would be appropriate under copyright. The copyright test would be applied to determine if a particular work serves both a utilitarian role and also exists in a separate role as artwork for the ordinary observer. As in determining trademark functionality, there are many evidentiary devices available for use in determining whether the work plays this dual role for copyright purposes. Factors which could tend to show functioning as artwork would include, without limitation: a materially higher price paid for the work because of the artwork component; any display or attempted display of the work in museums; publicity of the work as a work of art; the awarding of artistic prizes and/or the entering of the work into artistic competitions; inclusion in art publications; direct evidence of consumer perception of the work as a work of art (by affidavit or survey evidence); demonstrations of the importance of artistic concerns in creating the plans or drawings, expert testimony, and the number of copies made or intended to be made. See also Carol Barnhart, supra, 773 F.2d at 423 (Newman, J., dissenting).

Less emphasis should be placed on the determination of physical separateness (the present practice under the Copyright Office Compendium), and more should be placed on the ordinary observer's understanding of the architectural work as a work of art (as well as a utilitarian structure) -- that is, by determining whether the observer understands a work (or portions thereof) as being both a work of art and a utilitarian object. Granting copyright protection to a work so perceived will be consistent with the underlying motivation of affording authors of original works of authorship limited protection to encourage publication and creativity; at the same time, this would not interfere with the Congressional desire that non-separable elements of useful article designs not be protected. Our suggested approach also would be consistent with the evolving line of cases analyzing the copyrightability of artistic works from the viewpoint of individual artistic expression and the total concept and feel of the finished work. See, e.g., Chuck Blore v. Don Richman Inc. v. 20/20 Advertising Inc., 5 U.S.P.Q. 2d 1883 (D. Minn. 1987)("individual artistic choices" of elements of television commercial; including editing style); Kisch v. Ammirati & Puris Inc., 4 U.S.P.Q. 2d 1886 (S.D.N.Y. 1987)(similar, for photographs); Steinberg v. Columbia Pictures Industries, Inc., 663 F.Supp. 706 (S.D.N.Y. 1987) (artist's style, including choice of perspective, layout and details).

Applying this analysis to architectural works such as an original Frank Lloyd Wright home or office building, if understood as both buildings and as works of art, such works could, and should, enjoy copyright protection as works of art. Many such designs or elements of these designs are, after all, primarily a form of sculpture which may or may not have a utilitarian purpose, just as in the Kieselstein-Cord case and under Judge Newman's analysis of the mannequin sculptures in Carol Barnhart. Under the approach advocated here, many more elements of architectural design could and should be protected under copyright law.

By affording copyright protection not only to the plans but to the architectural art in the physical objects embodied in those plans, and hence in each of the physical objects reproduced from the plans, the Copyright Office will not be violating the separability test. No copyright registration, then, would be protecting a "house" per se, but instead will be protecting traditional copyrightable matter.

Commonplace elements used in architectural design should, of course, not be subject to copyright. But a particular original arrangement or compilation of those elements, alone or with new original matter, should be protectable.

The applicant for registration of a copyright claim in architectural plans should be permitted to choose whether or not to register the two dimensional plans alone or also the architectural art as well. Where the applicant is successful in registering the copyright claim in both, protection will be automatically afforded to copies based on the plans in all dimensions.

Finally, an architect's copyright rights in plans should not automatically provide a right to prohibit alterations or modifications in any authorized physical reproductions following the sale of such reproductions to third parties. There might be contract rights, or moral rights issues, on a case by case basis allowing the architect control over alterations or destruction after sale, but these need not flow automatically from the copyright without consideration of appropriate remedies. This is similar to the way copyright works in the museum art setting.

CONCLUSION

We have offered here a proposal for protecting architectural works which we believe will advance the copyright law, without requiring a corresponding change of that law. As works of art, architectural art should not be the subject of discrimination; and architects who author original works of expression should not be denied the right to participate in the rewards of copyright. Our proposal avoids both of these problems, and warms the chilling effect now placed on publication of unpublished architectural plans.

Respectfully submitted,

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